United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,633

996

CIRCLE DISCOUNT CORPORATION

Appellant

-vs-

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court for
the District of Columbia
Civil

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PRESS OF NATHAN SERVICES, INC., WASHINGTON, D. C.

JOINT APPENDIX

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

CIRCLE DISCOUNT CORPORATION
2401 Pennsylvania Avenue, N. W.
Washington, D. C.

Plaintiff,

vs.

UNITED STATES OF AMERICA

Defendant.

Filed May 15, 1961

Civil Action No. 1490-61

COMPLAINT FOR REFUND OF EXCISE TAXES
UNLAWFULLY ASSESSED AND COLLECTED

1. This Court has jurisdiction under the provisions of Section 1346(a), Title 28, United States Code.

2. The plaintiff is a corporation organized under the laws of the District of Columbia, and did business during the times pertinent herein in and around the District of Columbia. The defendant is the United States of America.

3. During the period October 1, 1959, through June 30, 1960, and both prior and subsequent thereto, the plaintiff was engaged in the importation and sale of used automobiles from Germany. The plaintiff sold the vehicles to purchasers in wholesale lots and individually at retail during the years 1959 and 1960.

4. The defendant at various times during 1959 and 1960 issued assessments against the plaintiff demanding the

payment of excise taxes on the sale of such used automobiles under the provisions of Section 4061, Internal Revenue Code.

5. Pursuant to such assessments, the plaintiff paid and the defendant unlawfully collected from the plaintiff the following sums on the dates indicated:

Date of Payment	Period Covered by Assessment	Amount
May 5, 1960	October 1, 1959 to December 31, 1959	$ 5,550.10
May 26, 1960	January 1, 1960 to March 31, 1960	4,696.82
July 7, 1960	April 1, 1960 to June 30, 1960	10,000.00

Thereafter, plaintiff timely filed claims and amended claims for refund of the taxes erroneously paid and unlawfully collected on Treasury Department Forms 843 asserting that the sale of the used automobiles imported by the plaintiff was not subject to the Manufacturer's Excise Tax imposed on the sale of vehicles under the provisions of Section 4061, Internal Revenue Code.

6. More than six months has expired since plaintiff filed its amended claims for refund. This suit has been timely filed.

7. The defendant, by reason of its unlawful assessments against and collections from the plaintiff under color of law, is indebted to the plaintiff in the sum of $20,246.92, together with interest from the date of such collection.

WHEREFORE, plaintiff prays for judgment against the defendant in the amount of $20,246.92, together with statutory interest and costs and such other amounts as may be allowed by law.

/s/ Joseph J. Lyman

Joseph J. Lyman

/s/ Jacob A. Stein

Jacob A. Stein
Attorneys for Plaintiff
1700 K Street, N. W.
Washington, D. C.

* * * * * * *

Filed July 12, 1961

ANSWER

The United States, defendant herein, by David C. Acheson, its United States Attorney for the District of Columbia denies all allegations of plaintiff's complaint not admitted, qualified or otherwise referred to below.

The defendant further answers as follows:

1. Admits the allegation contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3, except defendant alleges that it is without knowledge

or information sufficient to form a belief as to the truth of the allegation that the said used automobiles were imported "from Germany."

4. Admits the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5, except for the allegation that the sums paid to defendant were "unlawfully collected from the plaintiff", which allegation is denied. The defendant, however, alleges that the payment of $5,550.10 was made May 2, 1960 in lieu of May 5, 1960 and the payment of $4,696.82 was made May 25, 1960 in lieu of May 26, 1960. Finally, the defendant admits the allegations contained in the final sentence in paragraph 5; but denies that the taxes were "erroneously paid and unlawfully collected."

6. Admits the allegations contained in paragraph 6.

7. Denies the allegations contained in paragraph 7.

WHEREFORE, defendant prays that plaintiff take nothing from it in this suit and that the same be dismissed with costs against the plaintiff.

LOUIS F. OBERDORFER
Assistant Attorney General

EUGENE EMERSON
Attorney
Tax Division
Department of Justice

* * * * * * *

November 1, 1961

Filed November 2, 1961

PRE-TRIAL ORDER

Action for refund of excise taxes alleged to have been unlawfully assessed and collected on imported automobiles.

UNDISPUTED FACTS:

P, Circle Discount Corp., a corp., imported for sale during the period Oct. 1, 1959 through June 30, 1950, certain automobiles from Germany, or other foreign country. P sold said autos at wholesale and retail during the years 1959 and 1960.

D U.S. issued assessments for payment of manufacturers' excise tax imposed by Sec. 4061, Internal Revenue Code (26 USC), on said autos as follows:

Period	Amount
10/1/59 - 12/31/59	$ 5,550.10
1/1/60 - 3/31/60	4,696.82
4/1/60 - 6/30/60	10,000.00
Total	$20,246.92

P paid D the sum of $20,246.92 after demands.

P filed a timely claim for refund of the entire amount of $20,246.92 manufacturers' excise taxes. More than 6 months expired following the filing of the claim before P filed the suit.

PLAINTIFF contends that all of the autos imported by P were used autos, and that the manufacturers' excise tax on autos imposed by 26 USC 4061 does not apply to used autos.

P asks judgment against the D in the amount of $20,246.92, with interest as provided by law.

DEFENDANT U.S. denies that the tax was erroneously imposed. D contends that the tax imposed by Sec. 4061 (a) is applicable to the initial sale of an imported auto in the U.S., regardless of whether the auto is new or used.

D requests leave to assert the further defense that some or all of the autos imported by P were new and not used.

(Ø P objects to such amendment of D's answer on the grounds (1) the request is untimely and (2) it is not made in good faith, ✓ and (3) will necessitate further discovery.

D denies that P is entiled to any tax refund. z

STIPULATIONS:

Facts under "UNDISPUTED FACTS".

It is stipulated that the following may be admitted without formal proof of authenticity, subject to all other objections:

No documents presented at PT hearing of 11/1/61

(If amendment to answer is permitted, counsel will present for possible stipulation any documents relevant to said issue which may be in their possession.)

Counsel agree to exchange, at least a week before the trial date, the names and addresses of all witnesses known to them, including experts, if any, (filing a copy with the Clerk of the Court) and if they learn of any additional witnesses prior to trial will exchange the names and addresses promptly.

Trial attorneys: For Plaintiff: Joseph J. Lyman
For Defendant: Eugene Emerson

Asst. Pretrial Examiner

* * * * * * *

Washington, D. C.

Thursday, December 6, 1962.

Deposition of GERALD G. SCHULSINGER, witness in the above-entitled cause, called for examination by counsel for the defendant, pursuant to oral stipulation as to time and place, formal notice being waived, at Room 3429, U. S. Court House, Washington 1, D. C., beginning at 2:30 p. m., before Harry Kaitz, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

JOSEPH J. LYMAN, Esq., for the plaintiff.

HERBERT S. KENDRICK, Esq., Department of Justice, for the defendant.

Thereupon

GERALD G. SCHULSINGER

was called for examination by counsel for the defendant and, after having been sworn by the notary, was examined and testified as follows:

MR. KENDRICK: Let the record show that this deposition is being taken pursuant to the agreement of counsel, and counsel for both parties further agree that this deposition will be admissible as evidence without objection in the defendant's case.

DIRECT EXAMINATION

BY MR. KENDRICK:

Q State your name and address, please, sir. A My name is Gerald G. Schulsinger. My address is 25 O Street, Northwest, Washington, D. C.

Q What is your occupation? A I am an attorney.

Q You practice here in Washington, D. C.? A I practice in the District.

Q You are a member of the District of Columbia Bar? A Yes, sir.

Q Are you a member of any other bars beside the District of Columbia? A The Bar of the Supreme Court of the United

States and the Bar of the Courts of Appeals of the Fourth and Tenth Circuits.

Q Mr. Schulsinger, are you the owner of a Volkswagen automobile? A Yes, sir.

Q What model is that car? A Do you mean the year, sir?

Q Yes, sir. A 1960.

Q When did you purchase this car? A I ordered it in October of 1959, and I took delivery of it in December of 1959.

Q From whom did you purchase this car? A It was from an establishment on Wisconsin Avenue, across the street from Sears Roebuck. The name, as I recall, was Peake Motors, P-e-a-k-e, or something like that. However, I was asked to write out the check to Circle Discount Corporation.

Q Mr. Schulsinger, were you looking for a new or used car? A I was looking for a new car.

MR. LYMAN: Objection. That is leading, and it is immaterial. immaterial.

MR. KENDRICK: Your objection is noted.

THE WITNESS: I was looking for a new car.

BY MR. KENDRICK:

Q What year model were you looking for? A I was looking for a 1960 model, and I had canvassed the various franchise dealers in the area, one in Virginia, one in the District of Columbia, and one in Maryland. Each of them advised me that--

MR. LYMAN: Objection. Hearsay.

BY MR. KENDRICK:

Q He is objecting to the question. Go ahead and answer it. A I was told there would be a waiting period at each of these dealers of a period of several months.

Q Mr. Schulsinger, did you get a new car title with your car? A No, sir.

Q Can you explain the circumstances surrounding the title of your car? A The order form showed on it that it was used. I inquired why the order form showed used, and it was my understanding that--

MR. LYMAN: Objection to your understanding.

BY MR. KENDRICK:

Q Continue. A It was my understanding that I was to get a new car. It was explained to me that--

MR. LYMAN: Objection, unless he can say that this explanation came from some member of the Circle Discount Corporation.

BY MR. KENDRICK:

Q Did the explanation come from some member of the

Circle Discount Corporation? A The explanation came to me from a Mr. Lawrence Peake. I don't know his connection with the Circle Discount Corporation.

MR. LYMAN: I object to anything he is going to testify to unless it can be shown that Mr. Peake was an agent or a member of Circle Discount Corporation.

BY MR. KENDRICK:

Q Continue on. A It was explained to me by Mr. Peake that he was not a franchise dealer and thus unable to get new cars directly from the Volkswagen factory in Germany, but that the Volkswagen Company in Germany was obligated to sell a certain proportion of its output on the local market, i.e., the German market; and that Mr. Peake had people in Germany who brought up cars from German dealers, sent them to Hamburg where they made various innovations to meet American specifications, such as changing the headlights and I believe also the safety glass, and then sending them to this country.

Q Then you did get a used title to the car? A I did.

Q All right. What representations by the salesman, what representations to you did the salesman make regarding the purchase of the Volkswagen? A There were several. First of all, there were--

MR. LYMAN: Objection, unless he says who the salesman was, if he knows. I think you ought to establish that first.

THE WITNESS: The salesman was Mr. Lawrence Peake, P-e-a-k-e.

MR. LYMAN: Objection. It is hearsay, unless it can be shown that Mr. Peake was an agent or a member of Circle Discount Corporation.

THE WITNESS: The representations Mr. Peake made to me were these. First, there were several automobiles in the showroom on Wisconsin Avenue. My recollection is that there were three, one a closed model, one the sliding roof top model, and one a convertible model. All of them looked brand new to me. It was represented to me thatthe car I would be getting would be identical to the corresponding model. Second, it was represented to me that the car I would be getting would be exactly the same kind of car that I would get from a franchise dealer. Third, it was represented to me that I would be getting a warranty on the automobile identical to what a franchise dealer would provide me and that this would include free examinations and checkup and servicing of the automobile at the 300 mile mark, the 1,500 mile mark, and I forget what the third one is, 2,500 or 3,000. Also, that it would be a 1960 Volkswagen.

BY MR. KENDRICK:

Q Do you have the bill of sale for that automobile with you? A I do, Mr. Kendrick.

MR. KENDRICK: Mark this Defendant's Exhibit 1 for Identification.

MR. LYMAN: No objection.

(Bill of sale was marked Defendant's Exhibit No. 1 for Identification and retained by Mr. Kendrick.)

BY MR. KENDRICK:

Q I hand you a document here entitled "Car order and bill of sale and ask you to identify it please, sir. A This is the document I received at the time I ordered the car and placed a deposit upon it.

Q Do you have your checks that you made out for payment of the car? A I do, sir.

Q Do you have them with you? A I do, sir.

MR. KENDRICK: Mark these checks 2 and 3 for Identification.

(Check #568 in the amount of $100 was marked Defendant's Exhibit No. 2 for Identification; check #570 in the amount of $1086.40 was marked Defendant's Exhibit No. 3 for Identification. (Both documents were retained by Mr. Kendrick.)

BY MR. KINDRICK:

Q All right, sir, I ask you to identify those documents, Defendant's Exhibit No. 2 and 3. A Defendant's Exhibit No. 2 is the check which I wrote out at the time I placed the order for the automobile by way of deposit on the order in the amount of $100. Defendant's Exhibit No. 3 is the check I wrote out at the time I took delivery of the automobile representing the balance due over and above the original deposit and the trade-in which I made at that time.

Q How long did you have to wait for delivery of your car? A From October 24, 1959, to December 3, 1959.

MR. KENDRICK: Your witness.

CROSS EXAMINATION

BY MR. LYMAN:

Q Do you know anything about the manufacture and production of Volkswagens in Germany other than what was told you by the person that you claimed told you? A I have read the manual which was given to me at the time I purchased the car.

Q And other than what was told to you by the person that sold you the car and the manual, did you know anything else about the production and manufacture of Volkswagens in Germany? A I have read the advertisements and I have discussed the Volkswagens with people from time to time.

Q Why didn't you go to a franchise dealer and purchase your car? A I did, sir. I telephoned three franchise dealers, Heishman's in Virginia, an outfit the name of which escapes me on Rhode Island Avenue in the District of Columbia, and one in Maryland. Each of them told me they had a waiting list for 1960 Volkswagens of approximately six to nine months. I went to Heishman, nevertheless, and put down a deposit and got on the waiting list. However, the car I then had was on its last legs, and I was anxious to get a new automobile as quickly as possible. I was advised I could get one from Mr. Peake.

Q When you say a new automobile, you mean another automobile? A No, sir, I mean a new automobile.

Q Did Mr. Peake tell you this was a new automobile? A Yes, sir.

Q Doesn't it say plainly on Exhibit 1, "Please enter my order for one used car as follows"? A It does, sir.

Q Did you read the conditions on the back? A I did, sir.

Q Did you read No. 4, "No warranty or representation is made by seller as to the extent the car purchased has been used regardless of the mileage shown on the speedometer of the said car"? A I have no particular recollection of reading that condition, but I believe that I read all of the conditions at the time.

Q Would you read it now, No. 4? A Yes, sir. "Four. No warranty"--

Q I mean, just read it to yourself. A Yes.

Q Do you recollect item No. 4 under conditions being on Exhibit No. 1 when you purchased the car? A I am sure all of those conditions were there at the time, sir.

Q Were you aware of it? A Yes, sir.

Q Where was the car titled? A In the District of Columbia.

Q In the District of Columbia? A Yes.

Q And did you look at your title? A I did.

Q And it says right on the title used car, does it not? A It does.

Q Have you ever owned a new car? A Yes, sir.

Q And how did the warranty on your new car that you purchased differ from the warranty that you received here, which is on Exhibit 1? A My recollection is that the warranty on a new car also called for three inspections at various mileage points. I don't recall whether they were the same as on this one or different.

Q Isn't it a fact that when you have a warranty on a new car that it warrants specific things, such as your battery and moving parts and generators and transmission and the like? A I have no idea whether the warranty spells out particular parts. I read that warranty and it seemed very satisfactory to me for a new car.

Q And you also know that a warranty on a new car can be honored at any particular dealer of that car, isn't that true? A I know that, sir, and I specifically asked Mr. Peake why this was different.

Q And did you notice that here it states that the work must be done in our shop? A I did notice that, and as I said, I inquired about it.

Q And you were satisfied with that? A I was satisfied with it.

Q And you were satisfied to take a, sign a contract where you entered an order for a used car? A I was satisfied on the basis of all their representations made to me.

Q And you were satisfied that the company made no warranty or representation as to the extent the car had been driven regardless of the speedometer? A I was satisfied that the condition appeared on the reverse side of the form.

Q And you were satisfied to take the title in the District of Columbia that said used car? A I was, indeed.

Q And yet you say you bought a new car? A I certainly did.

Q Did you inspect the car, generally? A Yes, sir.

Q And isn't it a fact that the speedometer had been replaced? A I have no way of knowing that, but I was told that there would be a different speedometer, because an American mileage speedometer would be substituted for a German kilometer speedometer.

Q So you don't know how many kilometers it had been driven, do you? A I know that it seemed to me in every respect a new car, sir. It even had the new car smell.

MR. LYMAN: I move to strike that as being unsolicited. I don't believe he answered that original question. Will you give me my last question?

(The Notary-Reporter read the last question.)

THE WITNESS: No.

BY MR. LYMAN:

Q When was the first time you were approached by an agent of Internal Revenue? A Approximately one week ago yesterday. I believe it was a week ago yesterday.

Q Was that an agent of the Internal Revenue or a member of the Department of Justice? A I think he told me he was an agent of the Internal Revenue Service.

Q What did he tell you concerning the nature of his inquiry? A He first asked me certain questions which I answered. He then told me that there was a lawsuit brought by Circle Discount against the United States for refund of certain taxes. He then told me that I might hear from one of the lawyers conducting the case.

Q Was anything said about any of the officers of the corporation? A No, sir.

Q Was anything said about anyone misrepresenting the nature of the Volkswagens being sold by Circle Discount? A No sir.

Q Pardon. A No, sir. I may have volunteered that I received exactly what was represented to me and I was fully satisfied with the car in every respect.

Q Have you ever told anyone other than this agent that you bought a new car? A I am sure I told many people--

MR. KENDRICK: I object to that question. What he told somebody else wouldn't make any difference in this lawsuit.

BY MR. LYMAN:

Q And why did you tell them that you bought a new car when in fact you knew you bought a used car? A I told them that I bought a new car which had a used car title.

Q It was all guesswork on your part then, wasn't it? It was just your opinion, wasn't it?

MR. KENDIRCK: Objection.

BY MR. LYMAN:

Q Wasn't it just your opinion that you bought a new car with a used car title? A I don't understand the question, Mr. Lyman.

Q You told someone that you bought a new car with a used car title? A Yes, sir.

Q Is that right? A Yes, sir.

Q Well, now, what was the basis upon which you concluded that it was a new car?

MR. KENDRICK: Objection. It calls for a conclusion. He stated his reasons.

MR. LYMAN: This is cross-examination.

THE WITNESS: The basis was, first, that it was represented to me as a new car; second, when I took delivery of it, it seemed to me in every respect a new car; and, third, I wouldn't have accepted it if it weren't a new car.

BY MR. LYMAN:

Q You said that it was represented to you as a new car? A Yes, sir.

Q Now, this was Mr. Peake? A Yes, sir.

Q And what were the words he used? A I don't recall his exact words.

Q I am going to ask you to try to remember. What did he say? A He said that it would be exactly the same as the cars which were on display in the showroom and that after the changes were made in Hamburg it would be exactly the same as the car I would receive from a franchise dealer.

Q Now, the cars in the showroom were not the cars of a franchise dealer, were they? A I have no idea who owned them, sir.

Q Well, he had told you he was not a francise dealer, did he not? A He did.

Q And he told you you would get the same car as those in the showroom, is that correct? A Yes, sir.

Q Now, was any representation made toyou that the cars in the showroom were new cars? A I don't recall, sir. They seemed to me in every respect to be new.

Q You mean, they were shiny and smelled good?
A Smelled new.

Q Did the cars in the showroom have the familiar sticker which deals with the truth in labeling law? A I have no

recollection if it had a sticker, sir, or even if that law was in effect in October of 1959.

Q Assuming that it was in effect in 1959, do you recall seeing such a sticker on any of the windows of those three cars in the showroom? A I have no recollection of any sticker on the cars.

Q Was there a sticker on any window of your car at the time of delivery having to do with the truth in labeling law? A No, sir.

Q Did you ask about it? A About the absence of the sticker?

Q Yes, sir. A No, sir.

Q Isn't it a fact that the reason the sticker was not on there is because it was a used car? A I have no idea why there was no sticker or whether there was any legal requirement to have a sticker, whether new or used.

Q Did you have anyone else other than Circle Discount inspect this car at any time? A No, sir.

Q Did you have occasion to get under the car for any reason? A At the time of the purchase Mr. Peake who delivered it to me opened both the rear where the engine is and the front where the trunk is. I don't recall either he or I climed underneath it. I am sure I didn't.

Q And you found the car shined up on the body, is that correct? A It was shiny, yes, sir.

Q Did you have leather upholstery? A I don't know if the upholstery is a kinf of plastic or leather, sir.

Q It wasn't mohair type of covering, was it? A You are out of my element. I think it was vinyl.

Q Isn't it a fact that that had been put in there prior shipment to you? A I have no idea when it was put in there, sir.

Q And did you look under the fenders at the time? A Under the fenders, sir?

Q Yes, sir. A No.

Q To see whether there was road dirt? A I didn't look, sir.

Q I suppose you know if you did look you would have found it? A I know nothing of the sort. I doubt it.

Q But because the motor was cleaned up and the windows were shiny and the body was shining you assumed it was a new car? A It seemed to be a new car in every respect, sir. There wasn t a scratch on it.

Q Now, getting back to Mr. Peake, tell me exactly again what he said how his car he would sell you would compare with the franchise dealers car. A It would be exactly the same as the car I would receive from a franchise dealer. Originally, it would not be exactly the same, because the Volkswagen people made two cars, one a so-called export model and one for the German economy. These cars, as I pointed out, were intended for the German economy; and, according to

Mr. Peake, therefore needed certain adaptations to make them acceptable under American standards, including headlights, safety glass, and perhaps other features, turn signals.

Q But when he delivered it, it wasn't the same as you get from a franchise dealer, isn't that a fact? A I don't understand, sir. These various steps I talked about, the replacement of the beams, the installation of the new turn signals, and so forth, had all been performed.

Q That could be done on a used car, too, you know that. A Are you asking me if theoretically the adaptations could be made to a used car?

Q Yes. A The answer is yes.

Q But the car you received was not the same in all respects as that received from a franchise dealer, isn't that true? A It differed in these respects, sir. No. 1, the price was higher than I would have paid at a franchise dealer.

Q So that is one difference? A That is right. No. 2, the title specified a used car. No. 3, the work had to be done at Mr. Peake's garage. And, No. 4, these various adaptations had been performed. To my knowledge, there were no other differences.

Q Had you bought it from a franchise dealer you would have gotten a new car guarantee, would you not? A To my knowledge, this was a new car guarantee.

Q You would have received a new car title? A Correct.

Q And your bill of sale would have stated it was a new car? A It would.

Q And you would have paid a lesser price? A I would.

Q So it wasn't the same car as you get from a franchise dealer? A It differed in the respects I have enumerated.

Q You mentioned the turn signals? A Yes, sir.

Q They are the type of turn signals that you are familiar with in the American car? A Correct, sir.

Q Are you familiar with the turn signals sometime that you see in a foreign car like a flipper? A I am, sir. I was in Germany last year and rented a Volkswagen.

Q And the Bolkswagen over there had a flipper? A Yes.

Q Did you notice whether the flipper had been leaded in and welded to your frame here or not? A The provision for the flipper is there. You could see where the flipper would ordinarily be. What arrests it, what prevents it from movement, I have no idea.

Q But you can see that there is an impression, perhaps? A Oh, yes.

Q And this impression is painted over or welded over some how? A The break in the metal line is clearly recognizable. There may be a 1/16 of an inch or a 1/32 of an inch aperture there.

Q And from your knowledge of the Volkswagen that you saw in Germany, that would be where the flipper would ordinarily come out? A Yes, sir.

MR. LYMAN: That is all.

REDIRECT EXAMINATION

BY MR. KENDRICK:

Q Mr. Schulsinger, would you explain again why the word used appears on the title?

MR. LYMAN: Objection. This is only conjecture on his part.

BY MR. KENDRICK:

Q Would you tell us the explanation you received from the salesman as to why you were not going to receive a new car title? A Yes, sir. Mr. Peake explained to me that he was not a franchise dealer and thus not authorized by the Volkswagen Company to sell new cars, but the way he received his cars was by having somebody in Germany buy up automobiles from German dealers, send them to Hamburg for certain adaptations, and then to this country.

Q Now, in so far as your warranty is concerned, did the salesman assure you that this warranty was the same as a warranty on a new Volkswagen?

MR. LYMAN: Objection. The warranty speaks for itself.

BY MR. KENDRICK:

Q Go ahead. A I so understood, and it was so represented to me specifically.

Q You specifically asked about the warranty?

* * * * * * *

Q On that Wisconsin Avenue address that you went to, isn't it a fact that a big sign on the window said used Volkswagens? A I don't recall any such sign, and I would be mighty surprised if there were one in October of 1959 or in December of 1959.

Q You say you would be mighty surprised if you knew there was one. Why would you be surprised? A Because I wouldn't have gone in.

Q What do you have against Circle Discount, sir? A Nothing, sir.

Q What do you have against Mr. Peake? A Nothing. I should add I only heard of Circle Discount in so far as the name appeared on the bill of sale and in so far as I was directed to write the check out to them. Other than that, I have never heard of Circle Discount until I heard about this case.

Q What is the name of the place that you did go into? A As I testified earlier, it was Peake Motors or some adaptation of that, the word Peake there, Peake Automobiles, Peake Motors, Peake something.

Q Did you see Foreign Imports across the top of the door? A I don't recall, but it may have been, sir.

Q Pardon. A It may have been. I have no specific recollection of that.

Q Would you be surprised if it were on there? A Not at all.

Q Would you be surprised if the word used Volkswagens were on there? A I would be surprised if it were in any spot conspicuous enough for me to see it in October of 1959 or in December of 1959.

Q Now, I just want to clear that one point up. You are saying that the legend, used Volkswagens, was not displayed? A I don't recall, sir.

Q Well, if you wouldn't have walked in there because the phrase used Volkswagens would have been displayed, why would you purchase one when on your bill of sale the words used car are clearly displayed? A Because I was given to understand that I would be getting a new Volkswagen except for the several factors listed, the title, the various adaptations, the price.

Q Tell me something, why would you enter into such a transaction when you in your own mind knew something was wrong with it? A I certainly didn't know then or now that there was anything wrong with it.

Q Let me understand you, sir. You said you went to buy a new car and they gave you a used car title and you say there is nothing wrong with it. A I have no reason to believe

there is anything wrong with that, no, sir, so long as I know what I am getting and it is properly represented to me, which it was.

Q And you are saying that if the words used Volkswagens were on the front of the premises you would have not walked in, but yet when your contract states in terms that there is no guarantee as to how far this car has been driven you still insist that you were getting a new car? A Yes, sir.

Q Now, sir, why would you enter into an arrangement like that when you knew it wasn't exactly as it was represented to you? A It was exactly as represented to me.

Q Let me ask you, why did you pay more money for this car which was represented to you as used than you would for a new car? A Because I was promised delivery within forty-five days after the order was placed on 24 October, 1959, and to receive a new car from a franchise dealer would have required me to wait for a longer time.

Q So you were willing to pay more money for a car labeled publicly as used than wait for a few months for a car that you knew would have a warranty as a new car, isn't that true? A I was willing to pay more money for a car which seemed to me new but which the bill of sale said used than wait six or nine months to get a new car from a franchise dealer, yes, sir.

Q And you feel you are justified in representing on behalf of the defendant that the car you bought is a new car with all these circumstances? A I can't speak for the defendant, sir. I can only speak for myself. I received a new car with a used car title.

Q This is really your opinion, then, isn't it? A I don't understand your question.

Q I said what you are expressing is really an opinion, isn't that true? A I don't understand--

MR. KENDRICK: I will object to that. What he is expressing speaks for itself.

BY MR. LYMAN:

Q I am going to ask you, aren't you expressing an opinion that it was a new car? A So far as I am concerned, it was a fact, period.

Q What was a fact? A It was a fact that I was receiving a new car with a used car title.

Q Did that window on those premises on Wisconsin Avenue where you purchased your car say new Volkswagens? A I have no recollection that it did.

Q I believe your testimony just now was that you had to wait from six to nine months, did you say, for delivery? A At franchise dealers. My testimony was that I was told that I would have to wait six to nine months.

Q Do you still have the Volkswagen? A Yes, sir.

Q And do you intend to sell it at any time? A Not in the near future. I am very pleased with it.

Q And when you do sell it, do you intend to represent that you are the first owner?

MR. KENDRICK: I object to that. That is a matter of speculation.

BY MR. LYMAN:

Q I want to know if you intend to represent it that way. A Intend to represent exactly what happened.

MR. LYMAN: I have no further questions.

MR. KENDRICK: I have one other question.

FURTHER REDIRECT EXAMINATION

BY MR. KENDRICK:

Q Mr. Schulsinger, do you bear any ill will toward Circle Discount or Mr. Peake or whoever it was that sold you the car? A No, sir. I know nothing about Circle Discount, and I was very pleased with the transaction with Mr. Peake.

Q As far as you are concerned, it was a happy ending to the purchase of a Volkswagen? A Yes, sir.

MR. KENDRICK: That is all.

MR. LYMAN: That is all.

(Thereupon, the taking of the deposition was concluded.)

(By stipulation of counsel, with the consent of the witness, reading and signature waived.)

* * * * * * *

P R O C E E D I N G S

* * * * * * * * * * *

Filed Dec. 19, 1962

OPINION OF THE COURT

THE COURT: This case involves the construction and application of the Internal Revenue tax imposed on manufacturers and importers of automobiles, especially as it affects importers. This action is brought by an importer of automobiles to secure a refund of the tax that had been levied and assessed against him by the Internal Revenue Service on automobiles that he imported between October 1st, 1959 and June 30th, 1960. The amount of the tax involved is $20,246.92. This tax was paid to the Government after demand, a claim for refund was filed, and subsequently this suit was brought to recover the amount of the tax.

The plaintiff contends that the automobiles that he imported were used or second hand vehicles and that the tax in question is not applicable to used cars. The Government puts in issue the question of fact whether these vehicles were in fact new or used automobiles, but further contends that as a matter of law this issue of fact is immaterial and that the tax is applicable both to new and used cars.

Taking up first the question of fact, the principal witness in behalf of the plaintiff was Bruno Figlinzzi, who was the majority stockholder of the plaintiff corporation and managed and conducted its business. He testified that he

was in the business of importing and selling used foreign cars during the years involved in this case. In some detail he related that he made trips to Germany and that he purchased German automobiles, known as Volkswagens, from used car dealers and from private owners in Europe and that he did not purchase any from either the manufacturer or from a franchised dealer in new cars. He further testified that after he purchased those cars some changes were made in them in shops in Europe, in order that they would comply with the requirements of the laws and regulations of the various States of the Union. Subsequently to that they were brought to this country and sold either at wholesale to used car dealers or to individual purchasers.

There were introduced in evidence two samples of bills of sale used by the plaintiff in connection with selling the vehicles that it had imported. Each of those bills of sale referred to the automobile involved therein as a used car. The testimony is to the effect that this form was used by the plaintiff in all of its sales involved in this case. The Government offered no evidence to contradict this testimony.

The original invoices of the various importations, according to the testimony, are on file in the United States Customs Bureau, and so were easily available to the Government.

The title documents are on file in the various recording offices in the District of Columbia, Maryland or Virginia, where the sales of the automobiles were made.

It might be observed also that originally the defendant's answer did not deny, and by failure to deny admitted, the allegation that these automobiles were second hand vehicles. It was only at pretrial that the Government procured leave to amend the answer so as to assert that the automobiles were new; and, yet, no proof was introduced in behalf of the defendant on that issue.

The Court finds as a fact that the automobiles involved in this case were used vehicles.

This brings us to the question of law involved in this case, namely, whether the tax in question is applicable to used cars. The pertinent provisions of the statute imposing the tax are found in 26 United States Code 4061(a). The statute provides, in part, as follows:

> "There is hereby imposed upon the following articles . . . . sold by the manufacturer, producer or importer, a tax equivalent to the specified percent of the price for which so sold."

This sub-section provides that automobiles and trucks would be taxable at ten per cent.

This tax has been construed as an excise tax on the initial sale of the vehicle either by the manufacturer or an importer. No tax is imposed on any subsequent sales. It is important to observe that no exception is made for used or second hand cars. On its face, this statute is applicable to all cars sold by the manufacturer, producer or importer.

The Supreme Court, in referring to this tax, construed it as follows, in Indian Motorcycle Co. v. United States, 283 U.S. 570, 574:

> "We think it" -- that is, the tax -- "is laid on the sale, and on that alone. It is levied as of the time of the sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on first or initial sales -- those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed."

This case did not involve the point presented here and to a certain extent the foregoing statement may be considered a dictum; it is, however, helpful in determining the construction of the statute.

The Internal Revenue Service has administratively construed the statute as applicable to used automobiles of foreign manufacture. Internal Revenue Bulletin 58-297 deals with this subject and reads as follows:

"Used automobiles of foreign manufacture are imported and sold in this country. The importer's sales of the used automobiles constitute the initial sales of the automobiles within the United States. Held, the manufacturers excise tax on automobiles sold by the manufacturer, producer, or importer thereof, imposed by Section 4061 of the Internal Revenue Code of 1954, applies to the importer's sales of the automobiles. It is immaterial that the vehicles had been used prior to their importation."

To be sure, as counsel for the plaintiff contends, this statement is not a regulation and does not have the force of law. On the other hand, it indicates and is evidence of the administrative construction of the statute.

It is, of course, well established that an administrative construction of a statute by the agency charged with the duty of enforcing or applying it is entitled to great weight. Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315; United States v. American Trucking Assoc., 310 U.S. 534, 549; National Labor Relations Board v. Denver Building and Construction Trades Council, 341 U.S. 675, 692; Federal Trade Commission v. Mandel Brothers Inc., 359 U.S. 385, 391; West Texas Utilities Co. v. National Labor Relations Board, 97 App. D.C. 179, 181.

Necessarily, if the administrative construction is patently erroneous or unreasonable, it will be discarded by the Courts. This is not such a case, however. The statute is unambiguous. There is nothing in the legislative history that would unequivocally lead the Court to construe it otherwise than according to its literal meaning. Therefore, the Court reaches the conclusion that the statute is as applicable to the importations of used cars as it is to importations of new cars, the tax being levied on the initial sale.

It is urged, however, by counsel for the plaintiff that any ambiguity in a tax statute must be resolved in favor of the taxpayer. The Court agrees that this is a correct principle of law. The difficulty with applying it in the instant case is that there is no ambiguity on the face of the statute.

It is also urged that this interpretation of the statute would result in a discrimination as against imported used cars by comparison with sales of domestic used cars. The Court disagrees. The purpose of the statute is quite evidently to tax the initial sale of any automobile sold in this country, whether it is sold by a manufacturer of a vehicle fabricated in the United States or by an importer who brings it into this country. Under those circumstances, it cannot be reasonably argued that there is any discrimination as against used cars. Actually, if this tax was held inapplicable to

imported used automobiles, there would be a discrimination operating in the opposite direction. In any event, the question of discrimination, if it exists, is a matter for legislative consideration, and if there is any injustice in the tax the remedy lies alone with Congress.

Accordingly, the Court, as above stated, concludes that the tax is applicable to the initial sales in this country of imported used cars to the same extent that it applies to the initial sales of imported new cars.

A transcript of this oral decision will constitute the findings of fact and conclusions of law.

Judgment for the defendant dismissing the complaint on the merits.

* * * * * * *

CIRCLE DISCOUNT CORPORATION, Plaintiff

v.

UNITED STATES OF AMERICA, Defendant

CIVIL ACTION NO. 1490-61

Filed Dec. 20, 1962

FINAL JUDGMENT

This cause came on for trial before the Court, without a jury, on the 7th day of December, 1962, the parties having appeared by their respective counsel and the issues having been duly tried, and the Court having rendered its Opinion

on the 10th day of December, 1962 which is hereby adopted as Findings of Fact and Conclusions of Law, directing judgment as hereinafter provided, it is

ORDERED AND ADJUDGED that Final Judgment be, and the same hereby is, entered for the defendant, United States of America, and defendant is hereby awarded costs.

Dated at Washington, D. C., this 20th day of December, 1962.

/s/ Alexander Holtzoff

UNITED STATES DISTRICT JUDGE

* * * * * * *

FILED
January 9, 1963

CIRCLE DISCOUNT CORPORATION, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil No. 1490-61

NOTICE OF APPEAL

Notice is hereby given this 9th day of January, 1963, that Circle Discount Corporation hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of December, 1962 in favor of the United States of America against said

Circle Discount Corp., a corporation.

s/ Joseph J. Lyman

Attorney for Plaintiff

* * * * * * *

Defendant's Exhibit 4

October 17, 1959

Mr. Henry George
1358 Belvoir Blvd.
Cleveland 21, Ohio

Dear Mr. George:

Reference is made to your telephone call of October 16, 1959. Our price structure as you may realize is based on direct shipment. For a substantial order we may arrange a trip to Europe so that you may be acquainted with our mode of operation.

The price in our advertisement includes cost, insurance and freight to the port of your choice. Customs and duty charges will be paid by your company. The cost of customs and duty on 1960 sedans and/or sunroofs averages ninety-five dollars per unit.

In each shipment there will be an ample assortment of colors. All cars are deluxe models and come equipped with syncromesh transmissions, leatherette interiors, sealed beam headlights with out lamps, mileage speedometers, turn signals,

AS1 windshields, outside mirrors, heaters and defrosters. (Deduct $15.00 if cloth interiors are desired). They may be ordered with the following extras:

BUMPER RAILS, FRONT AND REAR $25.00

Becker Radios (Installed) 45.00

We can have cars delivered to you within 45 days from the date we receive your order, barring unforseen circumstances such as strikes.

Our 1960 Volkswagens must all be sold as used. We are not directly affiliated with any factory, consequently we cannot sell any of our cars as new. All of our cars are like new but will have from 1 to 100 miles on the speedometer.

All orders must be accompanied with an irrevocable letter of commitment from your bank. Payments may also be effected by a twenty percent deposit with the order and a letter of commitment by your company that the merchandise will be paid for within five days after its arrival at the port of your choice.

We are enclosing for your convenience a sample letter of commitment. Any questions will be gladly answered by Mr. Hugh Darling, Assistant Vice President of the Riggs National Bank.

We are looking forward to serving you.

Very truly yours,

Bruno Figlinzzi
President

Our trade references are:

Mr. Carl Dunnington, Vice President
Security Bank
Washington, D. C.

Mr. Edward Lacomis, Vice President
Reliable Finance Company
7845 Eastern Avenue
Silver Spring, Maryland

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BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,633

CIRCLE DISCOUNT CORPORATION

Appellant

-vs-

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court for the District of Columbia

JOSEPH J. LYMAN
1200 - 18th Street, N. W.
Washington 6, D. C.

JACOB A. STEIN
1200 - 18th Street, N. W.
Washington 6, D. C.

PRESS OF NATHAN SERVICES, INC., WASHINGTON, D. C.

No. 17,633

Questions Presented

The sole issue of law to be decided is whether the provisions of Section 4061(a), Internal Revenue Code (26 USCA §4061(a)), authorize the imposition and collection of Manufacturer's Excise Taxes on the importation and sale of used automobiles of foreign manufacture, as distinguished from new automobiles.

INDEX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17, 633

CIRCLE DISCOUNT CORPORATION

Appellant

-vs-

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

Appellant, plaintiff below, filed a complaint in the United States District Court on May 15, 1961, for refund of excise taxes unlawfully assessed and collected. (JA 1-3) Appellee, defendant below, answered and

issue was joined. (JA 3-4, 5-7) The District Court heard testimony, oral argument and briefs were filed. The District Court made findings of fact and conclusions of law. (JA 31-37) They are reported at 211 F. Supp. 743. On December 20, 1962, judgment was entered for the defendant. (JA 38) The District Court's jurisdiction was based on §1346(a), Title 28, United States Code. Notice of appeal was filed on January 9, 1963. (JA 38) This Court has jurisdiction under §1291, Title 28, United States Code.

STATEMENT OF THE CASE

The plaintiff, Circle Discount Corporation, brought this action to recover federal excise taxes, alleged to have been erroneously assessed and collected from it under the provisions of Section 4061(a), Internal Revenue Code, 26 USCA §4061(a), on the sales of second hand or used automobiles. (JA 1-3)

During October 1, 1959 through June 30, 1960, the plaintiff imported for sale used automobiles from Germany. Plaintiff sold the automobiles at wholesale and retail during the years 1959 and 1960. (JA 31, 33)

It is conceded that if the vehicles concerned were new, rather than second hand, they would have been subject to the tax in issue here and the plaintiff's cause would fail.

The government in its original answer did not deny that the vehicles in question were used or second hand. (JA 3-4) It changed its position, however, at pre-trial and moved to amend the Answer, alleging that the automobiles were in fact new, rather than used. (JA 5-6)

The Court found as a fact, specifically, that the vehicles were used or second hand Volkswagens imported into the United States by the plaintiff from Germany. (JA 31-33)

The defendant issued assessments for the payment of Manufacturer's Excise Taxes against the plaintiff on all the sales of the automobiles during this period. (JA 5)

The plaintiff paid the sum of $20,246.92 to the defendant after demand. (JA 5)

The plaintiff filed a timely claim for refund of the entire amount of $20,246.92 Manufacturer's Excise Taxes paid to the defendant. More than six months expired following the filing of the claims before plaintiff timely filed this suit. (JA 5)

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 4061. IMPOSITION OF TAX.

> (a) Automobiles. There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold:

(1) Articles taxable at 10 percent, except that on and after July 1, 1972 the rate shall be 5 percent--

Automobile truck chassis.
Automobile truck bodies.
Automobile bus chassis.
Automobile bus bodies.
Truck and bus trailer and semi-trailer chassis.
Truck and bus trailer and semi-trailer bodies.
Tractors of the kind chiefly used for highway transportation in combination with a trailer or semi-trailer.

A sale of an automobile truck, bus, truck or bus trailer or semitrailer shall, for the purposes of this paragraph, be considered to be a sale of the chassis and of the body.

(2) Articles taxable at 10 percent except that on and after July 1, 1961, the rate shall be 7 percent--

Automobile chassis and bodies other than those taxable under paragraph (1).
Chassis and bodies for trailers and semi-trailers (other than house trailers) suitable for use in connection with passenger automobiles.

A sale of an automobile, trailer, or semitrailer shall, for the purposes of thisparagraph, be considered to be a sale of the chassis and of the body.

(26 U.S.C. 1958 ed., Sec. 4061.)

STATEMENT OF POINTS

The District Court erred in concluding as a matter of law "that the tax is applicable to the initial sales in this country of imported used cars to the same extent as it applies to the initial sales of imported new cars." (JA 37)

SUMMARY OF ARGUMENT

The single question to be decided is whether a Manufacturer's Excise Tax under Section 4061(a), Internal Revenue Code, may be imposed upon used or second hand Volkswagens, German-made automobiles, imported into the United States for sale.

The Section imposes a 10% excise tax on the sale of vehicles by manufacturers, producers or importers. Plaintiff urges that the tax was intended to be imposed on the sale of new vehicles manufactured or produced either in the United States or abroad. The tax is assessed against the manufacturer or producer or an importer who acts in this country for manufacturers and producers abroad.

The "importer" is the agent of a foreign manufacturer or producer of vehicles for tax purposes under Section 4061(a).

The tax is intended to be imposed only on new vehicles both foreign and domestic. The government concedes that used vehicles sold in the United States are not subject to the tax, but insists, without reason, that

used vehicles of foreign manufacture, imported into the United States for sale are subject to the Manufacturer's Excise Tax, Section 4061(a), Internal Revenue Code.

The imposition of the 10% Manufacturer's Excise Tax on the sale of a foreign made, used automobile constitutes a discrimination between foreign and domestic used vehicles since no tax is imposed upon the sale of a domestic used vehicle. The domestic market in used vehicles is protected by means of the customs duty under the Tariff Act of 1930 which imposes an excise tax of 8-1/2% on new and used vehicles alike. In the final analysis the domestic automobile market in both new and used vehicles is amply protected from foreign encroachment.

Section 4061(a), Internal Revenue Code, on its face makes no distinction between new and used vehicles. It imposes a tax on sales made by manufacturers, producers and importers. Simple logic compels the conclusion that a manufacturer or producer cannot manufacture or produce a used vehicle. Hence, only new vehicles are taxed under the Section.

Congress expressly opposed the imposition of these taxes on used vehicles, but approved them as to new vehicles in its debates on a bill increasing the excise tax rates on automobiles.

The imposition of this tax was simply an innovation of the tax collector to collect as much tax as possible without regard to legislative authority.

This, we believe, is a case of first impression at the appellate level. Clarification of the Commissioner's powers in this area is essential.

ARGUMENT

I.

Section 4061(a), Internal Revenue Code, Is Not Open to A Construction Which Would Permit It To Impose Taxes On Used or Second Hand Vehicles.

This brings us to the question of law involved in this case, namely whether the tax in question is applicable to used automobiles imported into the United States from Germany.

The statute (Section 4061(a), Internal Revenue Code) provides in pertinent part:

> "There is hereby imposed upon the following articles * * * sold by the manufacturer, producer, or importer, a tax equivalent to the specified percent of the price for which so sold:
>
> * * *
>
> (2) Articles taxed at 10 percent * * * automobile chassis and bodies * * *.
>
> "A sale of an automobile * * * shall be considered to be the sale of the chassis and of the body."

The statute on its face makes no distinction between new and used vehicles. However, the construction placed on it by the Supreme Court[1/] leaves little doubt that only new vehicles are subject to the imposition of the tax.

The tax was construed to be on the sale of the vehicle, rather than on the manufacture or production of it, and then only on the initial sale. The tax is imposed on the manufacturer, producer or importer making the sale.

In Indian Motorcycle Co. v. United States, 283 U.S. 570, the Supreme Court was construing Section 600 of the Revenue Act of 1924, which was the predecessor of Section 4061, Internal Revenue Code, 1954. The wording is not materially different. The question involved there was not the same as that here. In the Indian Motorcycle Co., case, the Supreme Court determined that sales of vehicles to a municipality were exempt from the tax. Thereafter, any subsequent sale was not subject to the excise tax, although none had been paid previously.

The effect of the decision was that only a first sale was taxable; if for some reason no tax was collected on the first sale, then no tax was due on a subsequent sale of the same vehicle. The Supreme Court said at 283 U.S., p. 574:

1/ Indian Motorcycle Co. v. United States, 283 U.S. 570.

> "We think it is laid on the sale, and on that alone. It is levied as of the time of the sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on the first or initial sales--those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed."

Another construction was placed on Section 4061(a) by U. S. Truck Sales Co. v. United States, 229 F. 2d 693 (CA-6, 1956). There trucks manufactured in the United States and sold for export to the military service during World War II and shipped to Europe were exempt from the excise tax. Following the war some of the same trucks in a used condition were purchased by a dealer and imported into the United States. The Commissioner attempted to collect a Manufacturer's Excise Tax on their sale by the importer. The Circuit Court held that the trucks had been sold by the manufacturer for export and were exempt from the original sale. It was construed that the importation and sales of the same vehicles were not initial sales and hence exempt from tax under Section 4061(a).

Neither case concerned the importation of used vehicles of foreign manufacture and origin. The first sale of plaintiff's vehicles was made abroad, in Germany. They were thereafter purchased by him from individuals and dealers there (JA 32) and imported into the United States for subsequent sales. It was not until 1962 that this specific issue came to trial in the

federal courts. We know only of three cases in the trial courts,[2/] this case being one. We believe this is the first such issue noted for appeal.

ONLY NEW VEHICLES ARE SUBJECT TO TAX

The Manufacturer's Excise Tax, Section 4061, Internal Revenue Code, by its terms appears to draw a distinction between a new and used vehicle. The tax imposed is levied only on sales of new articles. This was clearly stated in Broad Motors v. Smith, 86 F. Supp. 4 (ED Pa., 1949), at p. 6:

> "The levying of such taxes applies without exception to 'new articles.' That is, these taxes apply to the first sale of a taxable article by the manufacturer, producer or importer, thereof. These taxes have no application to 'used' or 'second-hand articles,' even though the 'used' or 'second-hand articles' may be sold by the manufacturers, producers or importer, who made the taxable sale of the original article. Indian Motorcycle Co. v. United States, 283 U.S. 570, 51 S. Ct. 601, 75 L. Ed. 1277, S.T. 867, 1937-2 Cum. Bull. 505."

In the Revenue Act of 1951, the congessional mandate was clear that consumers of used cars were not to be burdened with the imposition of the

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2/ Slavenburg Corp. v. United States, 207 F. Supp. 314 (SDNY, 1962); G. L. Smith v. United States, Civ. No. 8625 (ND Tex.), decided October 23, 1962, P-H Excise Tax Rept. ¶198,517; Circle Discount Corp. v. United States, 211 F. Supp. 743 (DC DC, 1963). The Complaints in all of these cases were filed in 1961. It would seem that the Commissioner began his drive for revenue sometime prior. Claim procedures must first have been exhausted as a prerequisite to filing the suits. §6532(a), Internal Revenue Code.

Manufacturer's Excise Tax. It was stated in the Senate Report,[3/] see 2 U.S. Code Cong. Serv. (1951) at p. 2073:

> "Since the tax is not imposed on second hand cars, which in large measure represents the purchases made by lower income groups, it appears probable that the tax increase made by the bill will not bear heavily on these groups."

The statute on its face appears applicable to the sales of all vehicles by a manufacturer, producer or importer. Obviously, manufacturers and producers cannot manufacture or produce "used" vehicles. They must necessarily manufacture and produce new ones. The term "importer" in the statute, for tax purposes, should be construed as an "importer" for either a manufacturer or a producer of new automobiles.

Thus by operation of law, the foreign manufacturer or producer, who might otherwise escape the imposition of Section 4061(a) taxes, is made subject to assessment and collection through the importer. The importer is in effect an extension in this country from abroad of the manufacturer and producer described in Section 4061(a). By the terms of Section 4061(a) foreign manufacturers and producers, by the agency of the importer, are placed on the same tax footing as American manufacturers and producers. These sales

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3/ Senate Report No. 781, Sept. 18, 1951 (to accompany H. R. 4473), Section IX (Excise Tax Changes), Subsection C Manufacturer's Excises, in 2 U.S. Code Cong. Serv. (1951), 1969 at p. 2073. This became Public Law 183, Sec. 481, 82nd Cong. 1st Sess., text at 1 U.S. Code Cong. Serv. (1951) 308 at p. 421.

were probably the "first sales" which the Supreme Court had in mind when it discussed the scope of this section in Indian Motorcycle Co. v. United States, 283 U.S. 570, at 574.

THE 10% SECTION 4061(a) EXCISE TAX ON IMPORTED USED CARS IS DISCRIMINATORY

The imposition of a 10% excise tax under Section 4061(a) on the sale of used vehicles imported into this country draws an arbitrary distinction between used cars sold in the same market-place. As the system now stands, imported used cars of foreign origin are taxed at a rate of 18-1/2% of their value. This is composed of an 8-1/2% customs duty (an excise) and the 10% Section 4061(a) excise.

On the other hand, sales of American made vehicles on the used car market are exempt from both the customs duty[4/] and the Section 4061(a) excise tax. Tariff Act 1930, §1615(a), 19 USCA §1001.

Thus the domestic market in used cars is amply protected from encroachment from abroad by the imposition of customs duties under the Tariff Act of 1930. To reiterate, the tax collector thus imposes an 10% excise tax on a used car, contrary to expressed congressional intent that no Manufacturer's Excise Tax shall be imposed on "the purchases made by

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4/ §1615(a), Tariff Act of 1930.

lower income groups ***" because "* * * the tax is not imposed on second-hand cars." 2 U.S. Code Cong. Serv. (1951), at 1. 2073.

We submit that this area of the tax field, which at present seems unexplored, needs clarification. Guidance should be given dealers who apparently in good faith read the statute differently than the Commissioner.

II.

The District Court Accorded The Commissioner's Questionable, Administrative Ruling Greater Weight Than It Did Congressional Expression On The Same Subject

The sole basis for the Commissioner's assessment here is Rev. Rul. 58-297, 1958-1, Cum. Bull. 401, which provides:

> "Used automobiles of foreign manufacture are imported and sold in this country. The importer's sales of the used automobiles constitute the initial sales of the automobiles within the United States. Held, the manufacturer's excise tax on automobiles sold by the manufacturer, producer, or importer thereof, imposed by Section 4061 of the Internal Revenue Code of 1954, applies to the importer's sales of the automobiles. It is immaterial that the vehicles had been used prior to their importation."

At (JA 35) the District Court, in reference to Rev. Rul. 58-297, supra, stated:

> "It is * * * well established that an administrative construction of a statute by the agency charged with the duty of enforcing or applying it is entitled to great weight. * * * The statute is unambiguous. There is nothing in the legislative history that would unequivocally lead the Court to construe it otherwise than according to its literal meaning."

By this pronouncement the trial court concluded as a matter of law that used cars imported into this country are taxable under Section 4061(a).

The Congress, prior to the promulgation of Rev. Rul. 58-297, expressed itself otherwise when enacting the Revenue Act of 1951. It authorized an increase in the Manufacturer's Excise Tax with the understanding that " * * * the tax is not imposed on second hand cars* * *", 2 U.S. Code Cong. Serv. (1951), 1969 at p. 2073. See footnote 3, supra. There was nothing between 1951 and 1958 which would permit a departure from the expressed intent of the Congress.

Certainly Rev. Rul. 58-297 was not the product of the Revenue Act of 1951 wherein it was clearly asserted in the Senate Reports (see footnote 3) that second hand cars were not subject to the tax. Rather it was gleaned from dictum in U.S. Truck Sales Co. v. United States, 229 F. 2d 693 (CA-6, 1956). We observe that the words of art in Rev. Rul. 58-297 are:

> "* * * The importer's sales of the used automobiles constitute the initial sales of the automobiles within the United States."

This expression was obviously lifted from the gratuitous language of the Sixth Circuit opinion which decided a different issue favorably to the taxpayer. The dictum embraced by the Commissioner to promulgate his regulation is stated at 229 F. 2d 693 at ¶ 697-698:

> "* * * the purpose of the statute to tax only the first sale in the United States is carried out by construing the word 'importer' as one who imports a taxable article which was manufactured and initially sold outside of the United States and so not subject to the taxing statute until imported and sold for the first time in the United States."

A sound reading of Section 4061(a), together with the clear Congressional approval of exemption from tax for used cars requires that the prefatory and random remarks of the Sixth Circuit which have been seized upon to supply a spurious gloss of validity to Rev. Rul. 59-297 should be harmoniously related to the purposes of the Section and if it cannot be done should be regarded as surplusage.

The compelling provisions of Rev. Rul. 58-297 are an innovation of the tax collector to tap a source of revenue which the Congress has seen fit to exempt from Section 4061(a).

By resort to mischievous word playing and bureaucratic fiat the tax collector usurped a legislative function when he decided to impose the Manufacturer's Excise Tax on imported used cars. Those who challenge with conflicting interpretations of unambiguous statutes have the unhappy

burden of demonstrating that the Commissioner of Internal Revenue has the right to make law in the tax field. The defendant below seems to forget that taxation is a statutory subject and any tax assessed by the Commissioner must be authorized by Congress. The Supreme Court in Helvering v. Griffiths, 318 U. S. 371 at 394, said:

> "Under our judicial tradition we do not decide whether a tax may constitutionally be laid until we find that Congress has laid it."

The legislative history of Section 4061(a) is squarely in conflict with the government's position in this case.

It would seem that this is the time and place to define the scope of the Commissioner's powers as expressed in Rev. Rul. 58-297.

Section 4061(a) and its predecessor, Section 600, Revenue Act of 1924, have long standing in the Code without substantial change. No Regulation has ever been promulgated to say whether the Manufacturer's Excise Tax should be imposed on used or second hand vehicles imported into this country. The only administrative ruling on the subject is the one before us, Rev. Rul. 58-297, supra. Rulings of this kind have less dignity than Treasury Regulations. Admittedly, Rev. Rul. 58-297 is not based on any Regulation, but rather on the dictum discussed in U.S. Truck Sales Co. v. United States, supra.

> "Unless the administrative practice is long continued and substantially uniform in the Bureau and without challenge * * * in the * * * courts, it should not be assumed from rulings of this class that Congressional re-enactment of the language which they construed was an adoption of their interpretation." Higgins v. CIR, 312 U.S. 212, 216.

We fail to find such a fixed administrative construction simply from the District Court decisions cited in footnote 2. Rev. Rul. 58-297 was promulgated in 1958. Shortly thereafter assessments were made. We may assume that the taxpayers paid the assessments, filed claims for refund and otherwise pursued administrative remedies. The claim procedures were prerequisites to the filing of the suits. §6532(a), Internal Revenue Code. Considering the current status of federal court trial calendars, it is safe to assume that these cases constitute an immediate challenge to the Ruling. In the circumstances the Ruling is hardly seasoned. It certainly had not broadened into settled administrative practice. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 156.

If Section 4061(a) is unambiguous as the District Court found (JA 36), the basis escapes us for taxing new and used cars imported into this country at exactly the same rates, particularly when only new cars are apparently subject to tax under the Section.

This case, we believe, is one of first impression at the appellate level. We need look no further for clarification of the application of Section 4061(a) on the sale of used imported vehicles.

CONCLUSION

The sale of used vehicles, whether they be of foreign or domestic origin, imported into the United States are not subject to the imposition of taxes under the provisions of Section 4061(a), Internal Revenue Code. The judgment of the District Court should be reversed with directions to the Commissioner of Internal Revenue to allow the claim for refund.

Respectfully submitted,

Joseph J. Lyman

Jacob A. Stein

Attorneys for Appellant

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

483

No. 17,633

CIRCLE DISCOUNT CORPORATION

Appellant

-vs-

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court for the District of Columbia

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No. 17,633

Questions Presented

The sole issue of law to be decided is whether the provisions of Section 4061(a), Internal Revenue Code (26 USCA §4061(a)), authorize the imposition and collection of Manufacturer's Excise Taxes on the importation and sale of used automobiles of foreign manufacture, as distinguished from new automobiles.

INDEX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,633

CIRCLE DISCOUNT CORPORATION

Appellant

-vs-

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

Appellant, plaintiff below, filed a complaint in the United States District Court on May 15, 1961, for refund of excise taxes unlawfully assessed and collected. (JA 1-3) Appellee, defendant below, answered and

issue was joined. (JA 3-4, 5-7) The District Court heard testimony, oral argument and briefs were filed. The District Court made findings of fact and conclusions of law. (JA 31-37) They are reported at 211 F. Supp. 743. On December 20, 1962, judgment was entered for the defendant. (JA 38) The District Court's jurisdiction was based on §1346(a), Title 28, United States Code. Notice of appeal was filed on January 9, 1963. (JA 38) This Court has jurisdiction under §1291, Title 28, United States Code.

STATEMENT OF THE CASE

The plaintiff, Circle Discount Corporation, brought this action to recover federal excise taxes, alleged to have been erroneously assessed and collected from it under the provisions of Section 4061(a), Internal Revenue Code, 26 USCA §4061(a), on the sales of second hand or used automobiles. (JA 1-3)

During October 1, 1959 through June 30, 1960, the plaintiff imported for sale used automobiles from Germany. Plaintiff sold the automobiles at wholesale and retail during the years 1959 and 1960. (JA 31, 33)

It is conceded that if the vehicles concerned were new, rather than second hand, they would have been subject to the tax in issue here and the plaintiff's cause would fail.

The government in its original answer did not deny that the vehicles in question were used or second hand. (JA 3-4) It changed its position, however, at pre-trial and moved to amend the Answer, alleging that the automobiles were in fact new, rather than used. (JA 5-6)

The Court found as a fact, specifically, that the vehicles were used or second hand Volkswagens imported into the United States by the plaintiff from Germany. (JA 31-33)

The defendant issued assessments for the payment of Manufacturer's Excise Taxes against the plaintiff on all the sales of the automobiles during this period. (JA 5)

The plaintiff paid the sum of $20,246.92 to the defendant after demand. (JA 5)

The plaintiff filed a timely claim for refund of the entire amount of $20,246.92 Manufacturer's Excise Taxes paid to the defendant. More than six months expired following the filing of the claims before plaintiff timely filed this suit. (JA 5)

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 4061. IMPOSITION OF TAX.

> (a) Automobiles. There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold:

(1) Articles taxable at 10 percent, except that on and after July 1, 1972 the rate shall be 5 percent--

Automobile truck chassis.
Automobile truck bodies.
Automobile bus chassis.
Automobile bus bodies.
Truck and bus trailer and semi-trailer chassis.
Truck and bus trailer and semi-trailer bodies.
Tractors of the kind chiefly used for highway transportation in combination with a trailer or semi-trailer.

A sale of an automobile truck, bus, truck or bus trailer or semitrailer shall, for the purposes of this paragraph, be considered to be a sale of the chassis and of the body.

(2) Articles taxable at 10 percent except that on and after July 1, 1961, the rate shall be 7 percent--

Automobile chassis and bodies other than those taxable under paragraph (1).
Chassis and bodies for trailers and semi-trailers (other than house trailers) suitable for use in connection with passenger automobiles.

A sale of an automobile, trailer, or semitrailer shall, for the purposes of thisparagraph, be considered to be a sale of the chassis and of the body.

(26 U.S.C. 1958 ed., Sec. 4061.)

STATEMENT OF POINTS

The District Court erred in concluding as a matter of law "that the tax is applicable to the initial sales in this country of imported used cars to the same extent as it applies to the initial sales of imported new cars." (JA 37)

SUMMARY OF ARGUMENT

The single question to be decided is whether a Manufacturer's Excise Tax under Section 4061(a), Internal Revenue Code, may be imposed upon used or second hand Volkswagens, German-made automobiles, imported into the United States for sale.

The Section imposes a 10% excise tax on the sale of vehicles by manufacturers, producers or importers. Plaintiff urges that the tax was intended to be imposed on the sale of new vehicles manufactured or produced either in the United States or abroad. The tax is assessed against the manufacturer or producer or an importer who acts in this country for manufacturers and producers abroad.

The "importer" is the agent of a foreign manufacturer or producer of vehicles for tax purposes under Section 4061(a).

The tax is intended to be imposed only on new vehicles both foreign and domestic. The government concedes that used vehicles sold in the United States are not subject to the tax, but insists, without reason, that

used vehicles of foreign manufacture, imported into the United States for sale are subject to the Manufacturer's Excise Tax, Section 4061(a), Internal Revenue Code.

The imposition of the 10% Manufacturer's Excise Tax on the sale of a foreign made, used automobile constitutes a discrimination between foreign and domestic used vehicles since no tax is imposed upon the sale of a domestic used vehicle. The domestic market in used vehicles is protected by means of the customs duty under the Tariff Act of 1930 which imposes an excise tax of 8-1/2% on new and used vehicles alike. In the final analysis the domestic automobile market in both new and used vehicles is amply protected from foreign encroachment.

Section 4061(a), Internal Revenue Code, on its face makes no distinction between new and used vehicles. It imposes a tax on sales made by manufacturers, producers and importers. Simple logic compels the conclusion that a manufacturer or producer cannot manufacture or produce a used vehicle. Hence, only new vehicles are taxed under the Section.

Congress expressly opposed the imposition of these taxes on used vehicles, but approved them as to new vehicles in its debates on a bill increasing the excise tax rates on automobiles.

The imposition of this tax was simply an innovation of the tax collector to collect as much tax as possible without regard to legislative authority.

This, we believe, is a case of first impression at the appellate level. Clarification of the Commissioner's powers in this area is essential.

ARGUMENT

I.

Section 4061(a), Internal Revenue Code, Is Not Open to A Construction Which Would Permit It To Impose Taxes On Used or Second Hand Vehicles.

This brings us to the question of law involved in this case, namely whether the tax in question is applicable to used automobiles imported into the United States from Germany.

The statute (Section 4061(a), Internal Revenue Code) provides in pertinent part:

> "There is hereby imposed upon the following articles * * * sold by the manufacturer, producer, or importer, a tax equivalent to the specified percent of the price for which so sold:
>
> * * *
>
> (2) Articles taxed at 10 percent * * * automobile chassis and bodies * * *.
>
> "A sale of an automobile * * * shall be considered to be the sale of the chassis and of the body."

The statute on its face makes no distinction between new and used vehicles. However, the construction placed on it by the Supreme Court[1/] leaves little doubt that only new vehicles are subject to the imposition of the tax.

The tax was construed to be on the sale of the vehicle, rather than on the manufacture or production of it, and then only on the initial sale. The tax is imposed on the manufacturer, producer or importer making the sale.

In Indian Motorcycle Co. v. United States, 283 U.S. 570, the Supreme Court was construing Section 600 of the Revenue Act of 1924, which was the predecessor of Section 4061, Internal Revenue Code, 1954. The wording is not materially different. The question involved there was not the same as that here. In the Indian Motorcycle Co., case, the Supreme Court determined that sales of vehicles to a municipality were exempt from the tax. Thereafter, any subsequent sale was not subject to the excise tax, although none had been paid previously.

The effect of the decision was that only a first sale was taxable; if for some reason no tax was collected on the first sale, then no tax was due on a subsequent sale of the same vehicle. The Supreme Court said at 283 U.S., p. 574:

1/ Indian Motorcycle Co. v. United States, 283 U.S. 570.

> "We think it is laid on the sale, and on that alone. It is levied as of the time of the sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on the first or initial sales--those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed."

Another construction was placed on Section 4061(a) by U. S. Truck Sales Co. v. United States, 229 F. 2d 693 (CA-6, 1956). There trucks manufactured in the United States and sold for export to the military service during World War II and shipped to Europe were exempt from the excise tax. Following the war some of the same trucks in a used condition were purchased by a dealer and imported into the United States. The Commissioner attempted to collect a Manufacturer's Excise Tax on their sale by the importer. The Circuit Court held that the trucks had been sold by the manufacturer for export and were exempt from the original sale. It was construed that the importation and sales of the same vehicles were not initial sales and hence exempt from tax under Section 4061(a).

Neither case concerned the importation of used vehicles of foreign manufacture and origin. The first sale of plaintiff's vehicles was made abroad, in Germany. They were thereafter purchased by him from individuals and dealers there (JA 32) and imported into the United States for subsequent sales. It was not until 1962 that this specific issue came to trial in the

federal courts. We know only of three cases in the trial courts,[2/] this case being one. We believe this is the first such issue noted for appeal.

ONLY NEW VEHICLES ARE SUBJECT TO TAX

The Manufacturer's Excise Tax, Section 4061, Internal Revenue Code, by its terms appears to draw a distinction between a new and used vehicle. The tax imposed is levied only on sales of new articles. This was clearly stated in Broad Motors v. Smith, 86 F. Supp. 4 (ED Pa., 1949), at p. 6:

> "The levying of such taxes applies without exception to 'new articles.' That is, these taxes apply to the first sale of a taxable article by the manufacturer, producer or importer, thereof. These taxes have no application to 'used' or 'second-hand articles,' even though the 'used' or 'second-hand articles' may be sold by the manufacturers, producers or importer, who made the taxable sale of the original article. Indian Motorcycle Co. v. United States, 283 U.S. 570, 51 S. Ct. 601, 75 L. Ed. 1277, S.T. 867, 1937-2 Cum. Bull. 505."

In the Revenue Act of 1951, the congessional mandate was clear that consumers of used cars were not to be burdened with the imposition of the

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2/ Slavenburg Corp. v. United States, 207 F. Supp. 314 (SDNY, 1962); G. L. Smith v. United States, Civ. No. 8625 (ND Tex.), decided October 23, 1962, P-H Excise Tax Rept. ¶198,517; Circle Discount Corp. v. United States, 211 F. Supp. 743 (DC DC, 1963). The Complaints in all of these cases were filed in 1961. It would seem that the Commissioner began his drive for revenue sometime prior. Claim procedures must first have been exhausted as a prerequisite to filing the suits. §6532(a), Internal Revenue Code.

Manufacturer's Excise Tax. It was stated in the Senate Report,[3/] see 2 U.S. Code Cong. Serv. (1951) at p. 2073:

> "Since the tax is not imposed on second hand cars, which in large measure represents the purchases made by lower income groups, it appears probable that the tax increase made by the bill will not bear heavily on these groups."

The statute on its face appears applicable to the sales of all vehicles by a manufacturer, producer or importer. Obviously, manufacturers and producers cannot manufacture or produce "used" vehicles. They must necessarily manufacture and produce new ones. The term "importer" in the statute, for tax purposes, should be construed as an "importer" for either a manufacturer or a producer of new automobiles.

Thus by operation of law, the foreign manufacturer or producer, who might otherwise escape the imposition of Section 4061(a) taxes, is made subject to assessment and collection through the importer. The importer is in effect an extension in this country from abroad of the manufacturer and producer described in Section 4061(a). By the terms of Section 4061(a) foreign manufacturers and producers, by the agency of the importer, are placed on the same tax footing as American manufacturers and producers. These sales

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3/ Senate Report No. 781, Sept. 18, 1951 (to accompany H. R. 4473), Section IX (Excise Tax Changes), Subsection C Manufacturer's Excises, in 2 U.S. Code Cong. Serv. (1951), 1969 at p. 2073. This became Public Law 183, Sec. 481, 82nd Cong. 1st Sess., text at 1 U.S. Code Cong. Serv. (1951) 308 at p. 421.

were probably the "first sales" which the Supreme Court had in mind when it discussed the scope of this section in Indian Motorcycle Co. v. United States, 283 U.S. 570, at 574.

THE 10% SECTION 4061(a) EXCISE TAX ON IMPORTED USED CARS IS DISCRIMINATORY

The imposition of a 10% excise tax under Section 4061(a) on the sale of used vehicles imported into this country draws an arbitrary distinction between used cars sold in the same market-place. As the system now stands, imported used cars of foreign origin are taxed at a rate of 18-1/2% of their value. This is composed of an 8-1/2% customs duty (an excise) and the 10% Section 4061(a) excise.

On the other hand, sales of American made vehicles on the used car market are exempt from both the customs duty[4/] and the Section 4061(a) excise tax. Tariff Act 1930, §1615(a), 19 USCA §1001.

Thus the domestic market in used cars is amply protected from encroachment from abroad by the imposition of customs duties under the Tariff Act of 1930. To reiterate, the tax collector thus imposes an 10% excise tax on a used car, contrary to expressed congressional intent that no Manufacturer's Excise Tax shall be imposed on "the purchases made by

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4/ §1615(a), Tariff Act of 1930.

lower income groups ***" because "* * * the tax is not imposed on second-hand cars." 2 U.S. Code Cong. Serv. (1951), at 1. 2073.

We submit that this area of the tax field, which at present seems unexplored, needs clarification. Guidance should be given dealers who apparently in good faith read the statute differently than the Commissioner.

II.

The District Court Accorded The Commissioner's Questionable, Administrative Ruling Greater Weight Than It Did Congressional Expression On The Same Subject

The sole basis for the Commissioner's assessment here is Rev. Rul. 58-297, 1958-1, Cum. Bull. 401, which provides:

> "Used automobiles of foreign manufacture are imported and sold in this country. The importer's sales of the used automobiles constitute the initial sales of the automobiles within the United States. Held, the manufacturer's excise tax on automobiles sold by the manufacturer, producer, or importer thereof, imposed by Section 4061 of the Internal Revenue Code of 1954, applies to the importer's sales of the automobiles. It is immaterial that the vehicles had been used prior to their importation."

At (JA 35) the District Court, in reference to Rev. Rul. 58-297, supra, stated:

> "It is * * * well established that an administrative construction of a statute by the agency charged with the duty of enforcing or applying it is entitled to great weight. * * * The statute is unambiguous. There is nothing in the legislative history that would unequivocally lead the Court to construe it otherwise than according to its literal meaning."

By this pronouncement the trial court concluded as a matter of law that used cars imported into this country are taxable under Section 4061(a).

The Congress, prior to the promulgation of Rev. Rul. 58-297, expressed itself otherwise when enacting the Revenue Act of 1951. It authorized an increase in the Manufacturer's Excise Tax with the understanding that " * * * the tax is not imposed on second hand cars* * *", 2 U.S. Code Cong. Serv. (1951), 1969 at p. 2073. See footnote 3, supra. There was nothing between 1951 and 1958 which would permit a departure from the expressed intent of the Congress.

Certainly Rev. Rul. 58-297 was not the product of the Revenue Act of 1951 wherein it was clearly asserted in the Senate Reports (see footnote 3) that second hand cars were not subject to the tax. Rather it was gleaned from dictum in U.S. Truck Sales Co. v. United States, 229 F. 2d 693 (CA-6, 1956). We observe that the words of art in Rev. Rul. 58-297 are:

> "* * * The importer's sales of the used automobiles constitute the initial sales of the automobiles within the United States."

This expression was obviously lifted from the gratuitous language of the Sixth Circuit opinion which decided a different issue favorably to the taxpayer. The dictum embraced by the Commissioner to promulgate his regulation is stated at 229 F. 2d 693 at ¶ 697-698:

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burden of demonstrating that the Commissioner of Internal Revenue has the right to make law in the tax field. The defendant below seems to forget that taxation is a statutory subject and any tax assessed by the Commissioner must be authorized by Congress. The Supreme Court in Helvering v. Griffiths, 318 U. S. 371 at 394, said:

> "Under our judicial tradition we do not decide whether a tax may constitutionally be laid until we find that Congress has laid it."

The legislative history of Section 4061(a) is squarely in conflict with the government's position in this case.

It would seem that this is the time and place to define the scope of the Commissioner's powers as expressed in Rev. Rul. 58-297.

Section 4061(a) and its predecessor, Section 600, Revenue Act of 1924, have long standing in the Code without substantial change. No Regulation has ever been promulgated to say whether the Manufacturer's Excise Tax should be imposed on used or second hand vehicles imported into this country. The only administrative ruling on the subject is the one before us, Rev. Rul. 58-297, supra. Rulings of this kind have less dignity than Treasury Regulations. Admittedly, Rev. Rul. 58-297 is not based on any Regulation, but rather on the dictum discussed in U. S. Truck Sales Co. v. United States, supra.

> "Unless the administrative practice is long continued and substantially uniform in the Bureau and without challenge * * * in the * * * courts, it should not be assumed from rulings of this class that Congressional re-enactment of the language which they construed was an adoption of their interpretation." Higgins v. CIR, 312 U.S. 212, 216.

We fail to find such a fixed administrative construction simply from the District Court decisions cited in footnote 2. Rev. Rul. 58-297 was promulgated in 1958. Shortly thereafter assessments were made. We may assume that the taxpayers paid the assessments, filed claims for refund and otherwise pursued administrative remedies. The claim procedures were prerequisites to the filing of the suits. §6532(a), Internal Revenue Code. Considering the current status of federal court trial calendars, it is safe to assume that these cases constitute an immediate challenge to the Ruling. In the circumstances the Ruling is hardly seasoned. It certainly had not broadened into settled administrative practice. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 156.

If Section 4061(a) is unambiguous as the District Court found (JA 36), the basis escapes us for taxing new and used cars imported into this country at exactly the same rates, particularly when only new cars are apparently subject to tax under the Section.

This case, we believe, is one of first impression at the appellate level. We need look no further for clarification of the application of Section 4061(a) on the sale of used imported vehicles.

CONCLUSION

The sale of used vehicles, whether they be of foreign or domestic origin, imported into the United States are not subject to the imposition of taxes under the provisions of Section 4061(a), Internal Revenue Code. The judgment of the District Court should be reversed with directions to the Commissioner of Internal Revenue to allow the claim for refund.

Respectfully submitted,

Joseph J. Lyman

Jacob A. Stein

Attorneys for Appellant

BRIEF FOR THE APPELLEE

IN THE

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CIRCLE DISCOUNT CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the Judgment of the United States District Court for the District of Columbia Circuit

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STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee, the question presented is:

Whether the manufacturers excise tax applies to all initial sales of automobiles in this country, including sales by an importer of vehicles which he had purchased in Europe from private parties and used car lots.

INDEX

CITATIONS

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BRIEF FOR THE APPELLEE

COUNTER-STATEMENT OF CASE

The appellee accepts the statement of the case set out in the brief for the taxpayer (appellant herein), with the following, single, addition:

The taxpayer has never alleged, nor offered evidence to show, that the vehicles in question had been the subject of a sale in this country prior to the importation and sales which are the subject of this litigation.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 4061. IMPOSITION OF TAX.
>
> (a) *Automobiles.*—There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold:
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> * * * *
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> (2) Articles taxable at 10 percent * * *
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> Automobile chassis and bodies other than those taxable under paragraph (1).
>
> * * * *
>
> A sale of an automobile, trailer, or semitrailer shall, for the purposes of this paragraph, be considered to be a sale of the chassis and of the body.
>
> * * * *

(26 U.S.C. 1958 ed., Sec. 4061.)

SUMMARY OF ARGUMENT

The statute imposing the manufacturers excise tax applies it in clear, unambiguous and unqualified terms to "Automobile chassis and bodies". Nowhere in the taxing language is there any suggestion that the tax is not placed upon the sale of used automobiles. In each of three recent instances (including the instant case) where the courts have had before them, for the first times, the contention raised by the

taxpayer, it has been rejected as contrary to the clear statutory mandate and to the meaning necessarily to be drawn from authoritative judicial precedents. It has been conclusively and unmistakably established by these precedents, including a landmark decision of the Supreme Court, that all initial sales in the United States of the articles designated in the statute are subject to the tax and that this is the sole test of taxability. The cars imported and sold by the instant taxpayer, although the subject of prior sales in Europe, had never before been sold in this country. Consequently, their sale by the taxpayer was the initial sale in the United States upon which the authorities have expressly held the tax is laid. By the same token, the earlier European sales do not constitute the initial sale which, if made in this country, will exempt later sales here from the tax.

There is no valid authority for the taxpayer's attempt to read into the statute a blanket exemption from the excise tax for the sale of used cars. Certainly, there is no support for this in the statute. To the extent that language has appeared in several instances which would indicate the view that the sale of used goods is not taxable, it has been in the course of applying the rule, limiting the tax to initial sales in this country, to the common occurrence of a second sale in this country of the same item. Because at the time of such a second sale the item may normally be regarded as "used", the rule is occasionally stated to be, in a not completely accurate form of shorthand, that the tax does not lie upon the sale of used goods. It is clear, however, that where this expres-

sion has been used, the authors had reference only to situations involving used merchandise which, presumably because produced in this country, had been the subject of a prior sale here. There is no reason to believe that the authors had in mind the much less common situation involving the importation of used items and their initial sale here as such.

Nor do considerations of equity provide any support for the taxpayer's position. There is no similarity of function or purpose between the customs duty imposed on importation and the manufacturers excise tax on sales and, therefore, no basis for alleging double taxation, particularly since the taxpayer accepts the applicability of the latter to the sale in this country of new cars, the importation of which is also subject to the customs duties. Moreover, no discrimination is to be found in the fact that the tax is applied to the sale of newly imported used cars but not to those which have been the subject of a previous sale in the United States. The effect of the collection of the tax is not a one-shot affair but is added to the cost of the vehicle and continues to be reflected in its market value upon subsequent sales. Therefore, contrary to the contention of the taxpayer, the interests of equity require that the tax be also imposed on imported used cars being injected into our national stream of commerce so that they do not enjoy a competitive advantage over domestically-produced vehicles or any others which have previously been subjected to the tax.

To exempt imported and allegedly used cars from the excise tax, upon their initial sale in this country,

would disrupt the comprehensive scheme of the statute, create confusion and uncertainty with respect to the proper definition of a "used" car for the purposes of a statute which does not mention or imply such a line of demarcation and set up untold possibilities for tax avoidance and the resulting unfair trade advantage. The dangers are well typified by the operations of the instant taxpayer who, while contending for tax purposes that its vehicles are technically "used", in fact offers them for sale in competition with the new Volkswagens sold by franchised dealers. To permit it, on the basis of its own arbitrary and self-serving re-writing of the statute, to escape the excise tax which those new cars must pay would give it an extreme competitive advantage and constitute the height of discrimination against the franchised dealer.

ARGUMENT

THE DISTRICT COURT CORRECTLY RULED THAT THE MANUFACTURERS EXCISE TAX APPLIES TO ALL INITIAL SALES OF AUTOMOBILES IN THIS COUNTRY INCLUDING SALES BY AN IMPORTER OF VEHICLES WHICH HE HAD PURCHASED FROM PRIVATE PERSONS AND USED CAR LOTS IN EUROPE

A. The statute applies the tax to the first sale in this country of all automobiles, regardless of condition

1. *Statutory and judicial authority*

The primary issue involved in this case is whether an importer of cars manufactured and originally sold in a foreign country is exempted from payment

of the manufacturers excise tax on automobiles (Section 4061(a)(2), *supra*) upon the sale by him of those cars in this country, solely because they may be regarded as "used" rather than "new" vehicles. We submit that there is no authority, express or implied, for such a contention in the statutory language.

Section 4061(a), places the tax upon "the following articles," and Section 4061(a)(2) names "Automobile chassis and bodies." There is no qualification whatsoever[1] and no possible basis upon which the above language can be construed as referring to new cars but not to used or second-hand vehicles. Moreover, the Congress was at pains, in Section 4221 of the 1954 Code, as amended by Section 119(a), Excise Tax Technical Changes Act of 1958, P.L. 85-859, 72 Stat. 1275, to tell us what specific types of sales are to be exempted from the otherwise universal tax; the sale of used cars is not among them.

Rev. Rul. 58-297, 1958-1 Cum. Bull. 401, states the rule to be that:

> Used automobiles of foreign manufacture are imported and sold in this country. The importer's sales of the used automobiles constitute the initial sales of the automobiles within the United States. *Held*, the manufacturers excise tax on automobiles sold by the manufacturer, producer, or importer thereof, imposed by section 4061 of the Internal Revenue Code of 1954, applies to the importer's sales of the automobiles. It is immaterial that the vehicles had been used prior to their importation.

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[1] The taxpayer concedes (Br. 8) that "The statute on its face makes no distinction between new and used vehicles."

On three recent occasions (including the instant case), Federal District Courts have had the instant issue presented to them and, in each instance, ruled that the manufacturers excise tax applied to the sale by the importer of allegedly used or second-hand Volkswagens. In addition to the decision below, see *Slavenburg Corp.* v. *United States*, 207 F. Supp. 314 (S.D. N.Y.); *G. L. Smith, d/b/a Snuffy Smith Motor Co.* v. *United States* (N.D. Texas), decided October 23, 1962.[2] These are the only reported cases in which the particular question here involved appears to have been before the courts.

In reaching their conclusions, the above opinions cite as the controlling authorities the decision of the Supreme Court in *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, and that of the Sixth Circuit in *U.S. Truck Sales Co.* v. *United States*, 229 F. 2d 693. In *Indian Motocycle Co.*, the Supreme Court announced (p. 574) that, with respect to Section 600 of the Revenue Act of 1924, c. 234, 43 Stat. 253 (a substantially identical precursor of the current statutory provision for the manufacturers excise tax, Section 4061, 1954 Code), the tax in question was laid upon all first or initial sales of the article in question (rather than upon its manufacture) but only upon the first or initial sale.

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[2] The *Smith* case is currently pending on appeal to the United States Court of Appeals for the Fifth Circuit. For the convenience of the Court, the judgment of the District Court in that case granting summary judgment to the Government (no separate opinion was written) is printed in the Appendix, *infra*.

In *U.S. Truck Sales Co.* v. *United States*, *supra*, a truck manufacturer in this country had sold some of its products to the United States Government for use abroad. After the trucks had served the purposes of the Government they were sold in the foreign country in which they had been used by it and came, ultimately, into the possession of the taxpayer, who imported them back into this country for resale. The Government sought to impose the manufacturers excise tax on the resales and the taxpayer resisted on the ground that, in *Indian Motocycle Co.*, the Supreme Court had held that the tax applied only to first sales and that the trucks had already been the subject of a sale in this country even though that sale—from the manufacturer to the Government—had been tax-free. The Government was contending there that a prior *tax-free* sale was an exception to the rule laid down in *Indian Motocycle*, *supra*, and did not relieve from tax liability the subsequent sale in this country by the importer.[3] The Sixth Circuit held that, under the rule in *Indian Motocycle Co.*, the tax was imposed on the initial sale in this country only and that any subsequent resale here was not taxable, whether or not the initial sale had been tax-free.

In reaching the stated results, the above cases laid stress upon the scheme and purpose of the statute. In *Indian Motocycle Co.*, the Supreme Court observed that the collection of the tax from manufacturers, producers and importers was (p. 574) "no more than

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[3] Relying upon a prior sales tax ruling in S. T. 938, 1951-2 Cum. Bull. 213.

a comprehensive and convenient mode of reaching all first or initial sales, * * *." While sales by manufacturers and producers are considerably more likely to be of new acticles than used, the function of an importer is no more connected with one than with the other. However, all three have one characteristic in common. They represent the several sources from which articles are likely to be initially introduced into the stream of our national commerce and, together, pretty well exhaust the possibilities. Therefore, the unqualified inclusion of importers in the triumvirate upon whose sales the tax is laid clearly manifests the Congressional intent to catch all first sales by which that introduction is accomplished, regardless of the then condition of the article (i.e., new or used) or the number of previous owners. As stated above, the statute has been uniformly so interpreted by every court which has had occasion to consider, directly or indirectly, the particular issue at bar.

2. ***The authorities cited by the taxpayer do not support its position***

Although the taxpayer challenges the applicability of the manufacturers excise tax to his sales on the ground that they were of allegedly used cars, he attempts to support this by arguing (Br. 8-10) that the decisions in *Indian Motocycle Co., supra*, and in *U.S. Truck Sales Co., supra*, limited the tax to initial or first sales, regardless of where made. Putting aside for a moment the taxpayer's failure to recognize that this limitation applied only to first sales *in this country*, we submit that, in any event, there

is no identity between a limitation of the tax to first sales and a prohibition on taxing the sale of a used car. Whatever the merits of the taxpayer's position on either ground, it should be recognized that they are two separate arguments and one does not necessarily beget or support the other. For example, should a German company, manufacturing cars in Germany, hold a certain number of its products for its own use (as is not unusual among car manufacturers) those products will achieve the status of used cars without having been the subject of a sale.[4] Should that company then ship those cars to this country for sale, the excise tax would be barred by a rule prohibiting its application to the sale of used cars but, certainly, not by any rule limiting the tax to initial sales. On the other hand, cars produced by that German manufacturer may be sold and resold several times between various levels of dealers before being offered for sale in this country for the first time, as new cars. In such instance, the sale by the importer in this country would be unaffected by a rule limiting the tax to sales of new cars but would be subject to the broad rule apparently urged by the taxpayer that an initial sale *anywhere* will bar imposition of the tax on a subsequent sale in this country. Thus, while most sales of used cars will be other than the initial sale of those

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[4] Under Section 4218(a) of the 1954 Code, such use by a manufacturer in this country would be treated as the initial sale and would itself be subject to the tax. Obviously, however, this is limited to domestic manufacturers, the German producer being outside the taxing jurisdiction of this country.

vehicles, and *vice versa*, this is but a coincidental circumstance and not a necessary result. Rules barring the tax, on the one hand, on the sale of used cars and, on the other, on sales after the initial sale of the vehicle, are different in concept and scope and are not, as implied by the taxpayer's line of argumentation, different ways of expressing the same judicial rule or Congressional purpose. Nonetheless, in view of the District Court's finding that the cars were used, either rule, given the scope apparently contended for by the taxpayer, would prohibit the imposition of the excise tax on the Volkswagen sales which are here in issue. We will, therefore, discuss separately the two alleged rules and the alleged authority for them cited by the taxpayer.

With respect to the question of initial sales, the taxpayer places reliance (Br. 8-9) upon the language of the Supreme Court in *Indian Motocycle Co.*, *supra*, which holds in broad terms that the tax is laid, alone, on all first or initial sales. There is no doubt but that the Supreme Court did not, in terms, limit the scope of its words to sales made in this country. But, in considering the significance of that fact, it must be recognized that the court was there dealing with, and referring to, an initial sale made in this country because the motorcycles in question had been made and sold here. There is no reason to believe that the effect, tax-wise, of an initial sale outside of this country was within the contemplation of the Court in using the language in question or was intended to be embraced within its coverage. Moreover, if we look to the Court's reasoning which led

to the result in that case, the suggestion is clear that sales outside of the taxing jurisdiction of this country were not comprehended in the Court's use of the term "initial" sales. This is particularly found in the Court's observation, *supra*, that the selection of manufacturers, producers and importers as those from whom the tax would be collected was only a comprehensive and convenient mode of reaching all first or initial sales. The sales by importers which are thus made subject to the statutory tax are not, usually, the initial sales of the goods in question, the importer having previously purchased them abroad.[5] Clearly, then, in making the above observation, the Supreme Court had reference to those initial sales of manufacturers, producers and importers over which the Congress has taxing jurisdiction—that is, initial sales in this country. Since an earlier sale in a foreign country is not such an initial sale as was comprehended in the Supreme Court's use of that term, it cannot have the effect of barring imposition of the excise tax on the subsequent initial sale in this country by an importer.

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[5] We believe that there is little merit in the taxpayer's attempt (Br. 11) to construe the word "importer" in the statute as referring to those selling foreign made cars here as agents of the manufacturer. First, an importer is not, usually, an agent. Certainly, the ordinary usage of the term does not import that relationship. Secondly, if this had been the intent of the Congress, there would have been no need to include "importer" in the statutory language for it is hornbook law that sales by an agent of the manufacturer are sales by the manufacturer himself and would certainly be covered by the terms "manufacturer" and "producer".

The Sixth Circuit, in *U.S. Truck Sales Co.* v. *United States, supra,* based its decision squarely upon the pronouncement of the Supreme Court in *Indian Motocycle* and unmistakably construed its comments with respect to initial sales as relating only to such sales when made in this country, stating (p. 697) its agreement with the Supreme Court that the tax was "imposed only on the initial sale *in the United States.*" (Emphasis added.) It referred consistently to the "second sale in the United States" as that upon which immunity from the tax was bestowed. While in that case the issue directly decided by the Sixth Circuit was whether a tax-free sale constituted the initial sale in this country which would bar taxation of subsequent sales, consideration of the factual background which brought that question before the court focuses its decision upon the instant question.

It is to be noted that the trucks involved in the *U.S. Truck Sales Co.* case (p. 695) "had been used for military purposes and were in a worn condition." Certainly they were "used" in any sense of the term. Were there any merits in the instant taxpayer's argument, the importer's sales of those trucks would have been, by that obvious fact alone, immediately proof against imposition of the excise tax. Yet the Sixth Circuit did not seem to think so and found it necessary to establish through close reasoning that there had been an earlier "initial sale" made *in this country,* within the meaning of *Indian Motocycle Co., supra,* in order to exempt the sales by the importer from taxation. Not only were the trucks used but

they had been, in addition to the original sale to the Government in this country, the subject of a sale in Europe by the Government to private interests prior to re-importation to this country. As to this also, were there merit to the taxpayer's contentions that such a sale abroad, prior to importation, sufficed to exempt the sale here by the importer from the excise tax, it is difficult to imagine that the Sixth Circuit would have gone to the trouble to analyze the nature and consequences of the original tax-free sale in this country. Its sole reliance upon that sale represents an unspoken recognition that neither the sale in Europe nor the used condition of the trucks had any capacity, under the law, to exempt from the excise tax the sale here by the importer. This is clearly manifested by the court's observation (pp. 697-698) that—

> the purpose of the statute to tax only the first sale in the United States is carried out by construing the word "importer" as one who imports a taxable article which was manufactured *and initially sold* outside of the United States and so not subject to the taxing statute *until imported and sold for the first time in the United States.* In our opinion, that is the proper construction to be given to the statute. (Emphasis added.)[4]

The taxpayer (Br. 14-15) urges that the above language of the Sixth Circuit be regarded as a dictum

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[4] This language is squarely in conflict with the taxpayer's contention (Br. 11) that the importer, as contemplated in the statute, is simply the selling agent here for foreign manufacturers.

and as "prefaotory and random". In fact, these words lie at the heart of the court's analysis of the Congressional purpose in using the term "manufacturer, producer, or importer" and were a major factor in its explanation of the controlling conclusion that the tax was applicable only to the initial sale of any article in the United States.

In challenging the applicability of the excise tax to sales of used merchandise, reliance is placed by the taxpayer upon the appearance in one District Court opinion (Br. 10) and in the Committee Reports accompanying the Revenue Act of 1951 (Br. 11, 14) of language stating broadly that the excise tax is not imposed upon the sale of used goods. Considering first the Committee Reports, the substantially identical statements contained in the House and Senate Reports were to the effect that the increased tax rate proposed there for the manufacturers excise tax would not bear heavily upon the lower income groups since the tax is not imposed on second-hand cars, which are largely purchased by these groups. H. Rep. No. 586, 82d Cong., 1st Sess., p. 44 (1951-2 Cum. Bull. 357, 389); S. Rep. No. 781, 82d Cong., 1st Sess., p. 98 (1951-2 Cum. Bull. 458, 528). It must be borne in mind that this comment was not intended as a legalistic analysis of the limitations of the statute but as a general observation going to the incidence of the tax. It manifested recognition of the fact that *most* sales of used cars in this country are of vehicles manufactured and previously sold here and will, for the latter reason, bear no further tax. It is likely that the drafters of the report did not

have in mind sales by importers of used cars manufactured and first sold abroad because, at the time these reports were issued (1951), there were still very few imports of used foreign cars into this country. The popularity of the small foreign car for general use did not begin to reach significant proportions until the mid-1950's. Certainly, the market for *used* foreign cars among the lower income groups did not, until then, develop sufficiently to induce any appreciable pattern of importation of used vehicles.[7] Prior to 1950, the primary interest in this country in foreign cars was with respect to special vehicles (e.g. sports cars), very few of which were purchased by the lower income groups and even fewer, probably, imported as used cars. It is readily understandable, therefore, why those drafting the Committee Reports, in so far as they were concerned with purchases by the lower income groups, did not, at that time, give any thought to the sale of imported used cars and why there appears therein the not legalistically correct but, for the practical purposes of the time and the limited area of interest involved, the sound statement that the lower income groups would not be paying the excise taxes on their purchases of used cars.

These same quotations were cited by the taxpayer in *Slavenburg Corp.* v. *United States*, *supra*, and the court disposed of them quickly, saying (pp. 317-318):

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[7] Note that the first publication by the Internal Revenue Service on this subject (Rev. Rul. 58-297, 1958-1 Cum. Bull. 401) was not issued until 1958.

> In support of its motion for summary judgment, plaintiff relies primarily on language in the Senate Report that ". . . the tax is not imposed on second-hand cars, . . ." (*U.S. Code Cong. & Ad. Service,* 82nd Cong., 1st Sess., 1951, p. 2073); but it is plain from the context of the report, and from the decisions, that this language had reference only to subsequent sales after an *initial* sale in the United States. See *United States Truck Sales Co.* v. *United States, supra,* at p. 697. It in no sense relates to imported used cars of foreign manufacture which had not previously been sold in the United States.

And the Sixth Circuit in *U.S. Truck Sales Co., supra,* cited these same reports (p. 697) as evidencing intent of the Congress that the tax be "not imposed on the second sale in the United States of the same article."

The above comments largely apply with equal force to the statement, quoted by the taxpayer (Br. 10) from *Broad Motors Co.* v. *Smith,* 86 F. Supp. 4, 6 (E.D. Pa.), which was decided in 1949. The court there was concerned only with a special problem—whether a taxpayer engaged in the rebuilding and sale of motors was entitled to a credit, against the excise tax on those sales, for used parts built into the motor. So far as can be ascertained, the taxpayer was located in this country and the motors and the parts in question had all been of American origin, use and sale, throughout. The crucial phrase to which the taxpayer has reference is, of course, "These [excise] taxes have no application to 'used'

or 'second-hand articles'." This statement, if given literal interpretation, would be incorrect. The court gives no authority for it except the *Indian Motocycle Co.* case. It, therefore, was doing no more than applying the rule of that case (the tax applies only to initial sales) to the particular factual situation before it (involving used goods which had been subject to a prior sale in this country) and reached the obvious conclusion, quite correct when limited to the facts and issue there involved, that the tax did not apply to such used goods. The inadvertent universality of the language used, however, cannot be regarded as an authoritative declaration by the court with respect to an entirely different factual situation —one raising an issue not before that court, not apparently argued in the court and of which, it is likely, the court was not even aware. The best that can be said for the language in question, in so far as it might bear upon the instant issue, is that it was a dictum; however, we submit, it is far more reasonable to assume that the court intended its observation to apply only to used goods previously sold in this country.

The language from *Broad Motors Co.*, quoted by the instant taxpayer, was also quoted (pp. 696-697) by the Sixth Circuit in *U.S. Truck Sales Co.* which also interpreted it in the manner we have suggested as proper. As stated above, had that language been regarded by the Sixth Circuit as authority for the position of the taxpayer herein, it could have disposed quickly of the issue before it on the uncontested ground that the trucks there involved were

used and without its elaborate analysis of the tax-free aspect of their previous sale in the United States.

As against the unwarranted significance which the taxpayer seeks to attach to language used under circumstances where the instant problem was not posed and without any reason to believe that the authors were aware of it or intended their respective observations to cover it, we cite once again the fact that each of the three District Courts, *supra*, which, to date, have had before them the precise circumstances at issue have ruled that, without question, the tax is applicable to sales of both new and used vehicles.

3. *Equity is served by the imposition of the tax on an initial sale in this country of a car in a used condition*

There is no merit in the taxpayer's complaint (Br. 12) that the imposition of the excise tax on the initial sale in this country of an imported used car draws an arbitrary distinction between them and American made vehicles offered for sale in the same used car market. The basis of taxability is whether or not the sale in question is the first sale in this country. Place of manufacture has no bearing on the question except to the incidental extent that the initial sale, as a new car, of vehicles made in this country is more likely to have taken place here than is the case with foreign made cars. But, this does not make it a tax on the sale of used goods manufactured abroad. In this connection, it may be helpful to consider the applicability of the excise tax to certain situations of less common occurrence.

1. Assume that an American manufacturer produces goods in this country, ships them abroad *himself* (rather than selling to an exporter) and sells them in a foreign country. No sale will have been made in this country and no tax will have been paid. Should these goods later be reimported into the United States, the sale here by the importer would be subject to the excise tax because there had been no prior sale in this country and without regard to the fact that it was of United States manufacture.

2. Goods produced in Germany by a German manufacturer can be shipped by him directly to this country and sold here as new merchandise. This sale will be subject to the tax. The same goods can be sold in Germany, used there, and subsequently imported to this country. The tax will lie again because the sale here by the importer will, just as the direct sale by the manufacturer, be the first sale in this country. Assuming, then, a third, although rare, possibility, the goods cited in the above instances might then be reshipped abroad and, later, reimported into this country. The sale here by the second importer would be free from tax despite the fact that the goods are used and of German origin because they had been the subject of a prior sale in this country. (See *U.S. Truck Sales Co., supra.*)

It is evident, therefore, that the sale by an importer of used goods of German manufacture will not be subject to tax if the goods had been the subject of prior sale in this country, while a sale by an importer of used goods even of American manufacture will be taxable where it had not been the subject

of a prior sale here. This demonstrates that the single factor which, alone, determines taxability is whether or not there has been a prior sale in this country and the place of origin is only incidental and has no controlling influence upon liability.

Nor is there any greater merit in the implication (Br. 12) that, because customs duties must be paid on it, a used foreign car is subjected to a double tax on its importation into this country for sale. First, the Supreme Court has made it clear in *Indian Motocycle Co., supra* (p. 574), that the manufacturers excise tax is not a tax on importation but that its imposition on sales by importers is a simple and convenient way to catch all first sales in this country. Since, then, the purpose of the excise tax is not to protect domestic products, the taxpayer's assertion that the 8½ per cent customs duty provides sufficient protection is without significance. Moreover, the taxpayer appears to accept the propriety of applying the excise tax to the initial sale in this country of new importations, despite the fact that there also the customs duties must be paid. The obligation to pay such duties, therefore, can have no bearing on the question at bar.

The taxpayer's complaints regarding the alleged inequity of taxing the sale of imported used cars but not those produced and previously sold in this country are, in any event, wide of the mark for the record evidence demonstrates that, whether the Volkswagens imported by it were on the "new" or "used" side of whatever technical line of demarcation may be adopted to distinguish the two, those vehicles were

offered for sale by the taxpayer in competition with new cars and not in the true used car market (see the recitation of evidence in Point B, *infra*). Of particular note is the fact that the taxpayer was able to charge prices higher than those charged by the franchised dealers in new Volkswagens (R. 23),[8] something which he could scarcely have done unless his customers truly believed (as Gerald Schulsinger testified that he did (R. 27-28)) that they were getting new cars or the equivalent thereof.

But, even had the taxpayer been competing in the used car market, the interests of equity would have called for the imposition of the excise tax on its sales of imported cars. The great bulk of the American made cars with which he would then be competing (that is, those initially sold in this country) would already have been subjected to the excise tax at the time of their initial sale here as new cars. That tax was passed on to the first purchaser as part of the price and became part of the market value of the car. When it was subsequently offered for sale as a used car, the increased original cost represented by the tax was still reflected in its market value—that is, the asking price reflected the pro rata share of the excise tax paid on the vehicle's initial sale just as it did the pro rata share of the cost of the materials, of labor and of any other factors making up its original cost to the first purchaser. Putting this in specific terms—assume a vehicle whose selling price, absent the excise tax, would be

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[8] Record references are to the Joint Appendix.

$2,000. Applying a 10 per cent excise tax ($200), the total cost to the first purchaser would be $2,200. If we then assume a first year depreciation of 20 per cent, its market value at the end of the first year would be $1,760, whereas, without the excise tax, a 20 per cent depreciation on the then cost of $2,000 would leave a market value of $1,600. If a competitive German automobile of the same cost and rate of depreciation as the American car were imported and put on sale here when one year old, the importer would, if the excise tax were not also imposed on that sale, be able to offer it for $1,600, thus undercutting and having a trade advantage over the American cars which must bring $1,760. It will be noted that, because of the pro rata effect, the application of a 10 per cent tax on the German car at its depreciated price of $1,600 will result in a tax of $160 (instead of the $200 tax it would have sustained had it been initially sold in this country when new) and place it on a competitive par with the $1,760 American car. Thus, quite to the contrary of the taxpayer's claim, the imposition of the tax on the initial sale of used as well as new foreign produced cars will not place them at a competitive disadvantage but is necessary in order to avoid giving them an unfair and illegal advantage. The controlling factor that must be recognized is that the excise tax is not a one-shot matter but remains with the automobile as a depreciating cost factor throughout its life and imposes a pro rata cost on later sales as well as the one in connection with which it is actually collected. Thus, equity and the scheme of the statute

require that the excise tax be added to the cost of an automobile at the time when it is first injected into the flow of the American commerce (the initial sale). When imposed on a second-hand sale the amount of the tax will approximately equal the pro rated impact of the tax on an equivalent second-hand sale of a vehicle whose initial sale in this country was "new".

Were the tax not imposed on "used" or "second-hand" cars, a German manufacturer could easily achieve a major advantage over new American cars by effecting a "sale" to a straw party and/or by putting a few miles on the speedometer and selling as "used", and tax-free, what is otherwise an obviously new car.

B. The arbitrary injection of the new or used test into the statutory language would only make for confusion, discrimination and tax avoidance

In the District Court, the Government contended, alternatively, that if the excise tax applied only to new cars, the Volkswagens sold by the taxpayer were new cars. The court found (R. 33) that they were used cars, observing that "no proof was introduced in behalf of the defendant [Government] on that issue." Without commenting on that finding, we submit that there is ample evidence that the cars were represented by the taxpayer as new cars. In Defendant's Exhibit 4, a letter of October 17, 1959, from the president of the taxpayer* to a prospective

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* The letter is signed by "Bruno Figlinzzi, President". The court observed (R. 31) that Mr. Figlinzzi was the majority stockholder of the taxpayer and managed and conducted its business.

purchaser in quantity, it is stated that the cars are like new and will have from one to 100 miles on the speedometer. It is explained that the cars cannot be sold as new because the taxpayer is not a franchised dealer. (R. 39-41.) The implication is clear.

The nature of the sales is brought out even more sharply in the deposition of Gerald G. Schulsinger (R. 7-30) who testified that he (1) was looking for a new car (R. 9); (2) was unable to wait out the six to nine months waiting period at franchised dealers (R. 10, 14); (3) was told at the taxpayer's showroom that he would get a new car but would have to take a used car title because the taxpayer was not a franchised dealer (R. 10-11, 15, 19); (4) got the equivalent of a new car warranty (R. 12) save that any work would have to be done at the taxpayer's shop (R. 16); (5) paid a higher price for his Volkswagen than that being asked by the franchised new car dealers (R. 23); and (6) was pleased with the car he got which was in all respects as represented to him (R. 28, 30).

From this it may be seen that the taxpayer seeks to escape taxation on the technicality that (assuming the tax applied only to sales of new cars) the cars in question had changed hands previously. This demonstrates the tenuous nature of the "new-used" test which the taxpayer seeks to establish. Shall the tax be laid on sales of cars which have never before changed hands? But, even new cars sold by a franchised dealer have frequently been sold by the manufacturer to a whosesaler or the dealer and sometimes, additionally, from wholesaler to dealer or

from dealer to dealer. Shall the tax apply when the speedometer shows five miles, 20 miles, 100 miles? New cars purchased from franchised dealers usually show some mileage.

While the taxpayer complains that it is inequitable to tax the sale of his allegedly used cars and not that of used cars of American manufacture (the fallacy of which we have already shown), we see that it was in fact selling its cars in competition with new and not used cars. The exemption from taxation which is sought will not place the taxpayer on an even footing with American made used cars but give it an unfair competitive advantage over dealers in new cars—domestic and foreign alike. Thus it may be clearly seen that, while there is no warrant in the statutory language and no reason in equity for applying the manufacturers excise tax to the sale of new cars but not that of used, the arbitrary application of such a distinction will pose serious problems of definition and demarcation and will facilitate tax avoidance and unfair competitive practices by dealers who, for tax purposes, claim their vehicles are technically "used" but who can offer them to the public, in competition with new cars, as new or as the equivalent of new.

On the issue of whether the cars in question were new or used, the District Court found that the evidence on behalf of the taxpayer was (1) that Bruno Figlinzzi had testified that he had purchased these vehicles from private individuals and used car dealers in Europe, rather than from the manufacturer or a franchised dealer and (2) that the bills of sale

under which he resold them referred to the vehicles as used cars. (R. 31-32.) With respect to the latter evidence, it is established in the record that this was necessitated by the taxpayer's lack of franchised status. No matter how new the vehicles might have been, they could not have been sold by the taxpayer under a new car title. This designation on the bills of sale, therefore, is solely indicative of the taxpayer's unfranchised status and not of the actual condition of the cars sold by it.

There is left only the testimony as to the European sources from which the taxpayer purchased the cars. We submit that there is not the slightest authority in the statute, in its history or in its judicial interpretation to warrant the arbitrary distinction that initial sales in this country of imported cars are subject to the excise tax if the vehicles were purchased by the importer from a franchised dealer in Europe but not if purchased from used car dealers or private persons. This is the real issue and it can only be confused by evaluating the above evidence from the entirely irrelevant standpoint of whether or not it qualifies the cars for some arbitrary designation (which nowhere appears, or is reflected, in the statute) of "new" as opposed to "used" cars.

CONCLUSION

For all of the above reasons, the judgment of the District Court was correct and should be affirmed.

Respectfully submitted,

LOUIS F. OBERDORFER,
Assistant Attorney General.

LEE A. JACKSON,
DAVID O. WALTER,
WILLIAM A. FRIEDLANDER,
Attorneys,
Department of Justice,
Washington 25, D. C.

DAVID C. ACHESON,
United States Attorney.

ELLEN LEE PARK,
Assistant United States Attorney.

APRIL, 1963.

APPENDIX

JUDGMENT

Filed Oct. 24, 1962

In the United States District Court for the Northern District of Texas, Dallas Division

Civil No. 8625

G. L. Smith d/b/a Snuffy Smith Motor Co., Plaintiff

vs.

United States of America, Defendant

The above entitled cause having come before the Honorable Sarah T. Hughes, United States District Judge for the Northern District of Texas, on defendant's motion for summary judgment, pursuant to Rule 56 of the Rules of Civil Procedure, the Court having considered the instruments of record on file herein including the pleadings, stipulations, exhibits and briefs of counsel, being of the opinion that the defendant is entitled to judgment as a matter of law, and having heretofore announced its decision sustaining defendant's motion for summary judgment by letter to counsel dated October 17, 1962;

The Court being of the opinion that the excise tax imposed by Section 4061 of the Internal Revenue Code of 1954 applies to sales by plaintiff since they were the first sales in the United States of the imported cars and this tax applies to first sales of importers irrespective of whether the imported items be new or used; and that imposition of the excise tax is not discriminatory and violative of the Treaty of Friendship, Commerce and Navigation with West Germany as alleged by plaintiff when applied to used cars, inas-

much as the tax is on the first sales in the United States, thus giving identical treatment to the first sale of foreign and domestic goods;

And the Court being further of the opinion that the taxpayer's sales to retailers (dealers) are not covered by the "constructive sales price" provision of Section 4216(b)(1) and hence only the actual sale price may be used in determining the tax; and that the taxpayer is not entitled to more favorable treatment on his sales to consumers at retail than that accorded him by the computation of the revenue agent based upon the average price to dealers; it is, therefore

Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same is hereby granted, and that plaintiff's complaint be and the same is hereby dismissed with prejudice, with costs to be taxed to the plaintiff.

Entered this 23 day of October, 1962.

SARAH T. HUGHES,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1963 663073 1068

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,633

CIRCLE DISCOUNT CORPORATION

Appellant

-vs-

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court for
the District of Columbia
Civil

JOSEPH J. LYMAN
1200 - 18th Street, N. W.
Washington 6, D. C.

JACOB A. STEIN
1200 - 18th Street, N. W.
Washington 6, D. C.

PRESS OF NATHAN SERVICES, INC., WASHINGTON, D. C.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,633

CIRCLE DISCOUNT CORPORATION

Appellant

-vs-

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court for
the District of Columbia
Civil

TABLE OF CONTENTS AND INDEX TO
JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

CIRCLE DISCOUNT CORPORATION
2401 Pennsylvania Avenue, N. W.
Washington, D. C.

Plaintiff,

vs.

UNITED STATES OF AMERICA

Defendant.

Filed May 15, 1961

Civil Action No. 1490-61

COMPLAINT FOR REFUND OF EXCISE TAXES
UNLAWFULLY ASSESSED AND COLLECTED

1. This Court has jurisdiction under the provisions of Section 1346(a), Title 28, United States Code.

2. The plaintiff is a corporation organized under the laws of the District of Columbia, and did business during the times pertinent herein in and around the District of Columbia. The defendant is the United States of America.

3. During the period October 1, 1959, through June 30, 1960, and both prior and subsequent thereto, the plaintiff was engaged in the importation and sale of used automobiles from Germany. The plaintiff sold the vehicles to purchasers in wholesale lots and individually at retail during the years 1959 and 1960.

4. The defendant at various times during 1959 and 1960 issued assessments against the plaintiff demanding the

payment of excise taxes on the sale of such used automobiles under the provisions of Section 4061, Internal Revenue Code.

5. Pursuant to such assessments, the plaintiff paid and the defendant unlawfully collected from the plaintiff the following sums on the dates indicated:

Date of Payment	Period Covered by Assessment	Amount
May 5, 1960	October 1, 1959 to December 31, 1959	$ 5,550.10
May 26, 1960	January 1, 1960 to March 31, 1960	4,696.82
July 7, 1960	April 1, 1960 to June 30, 1960	10,000.00

Thereafter, plaintiff timely filed claims and amended claims for refund of the taxes erroneously paid and unlawfully collected on Treasury Department Forms 843 asserting that the sale of the used automobiles imported by the plaintiff was not subject to the Manufacturer's Excise Tax imposed on the sale of vehicles under the provisions of Section 4061, Internal Revenue Code.

6. More than six months has expired since plaintiff filed its amended claims for refund. This suit has been timely filed.

7. The defendant, by reason of its unlawful assessments against and collections from the plaintiff under color of law, is indebted to the plaintiff in the sum of $20,246.92, together with interest from the date of such collection.

WHEREFORE, plaintiff prays for judgment against the defendant in the amount of $20,246.92, together with statutory interest and costs and such other amounts as may be allowed by law.

/s/ Joseph J. Lyman

Joseph J. Lyman

/s/ Jacob A. Stein

Jacob A. Stein
Attorneys for Plaintiff
1700 K Street, N. W.
Washington, D. C.

* * * * * * *

Filed July 12, 1961

ANSWER

The United States, defendant herein, by David C. Acheson, its United States Attorney for the District of Columbia denies all allegations of plaintiff's complaint not admitted, qualified or otherwise referred to below.

The defendant further answers as follows:

1. Admits the allegation contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3, except defendant alleges that it is without knowledge

* * * * * * *

November 1, 1961

Filed November 2, 1961

PRE-TRIAL ORDER

Action for refund of excise taxes alleged to have been unlawfully assessed and collected on imported automobiles.

UNDISPUTED FACTS:

P, Circle Discount Corp., a corp., imported for sale during the period Oct. 1, 1959 through June 30, 1950, certain automobiles from Germany, or other foreign country. P sold said autos at wholesale and retail during the years 1959 and 1960.

D U.S. issued assessments for payment of manufacturers' excise tax imposed by Sec. 4061, Internal Revenue Code (26 USC), on said autos as follows:

Period	Amount
10/1/59 - 12/31/59	$ 5,550.10
1/1/60 - 3/31/60	4,696.82
4/1/60 - 6/30/60	10,000.00
Total	$20,246.92

P paid D the sum of $20,246.92 after demands.

P filed a timely claim for refund of the entire amount of $20,246.92 manufacturers' excise taxes. More than 6 months expired following the filing of the claim before P filed the suit.

or information sufficient to form a belief as to the truth of the allegation that the said used automobiles were imported "from Germany."

4. Admits the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5, except for the allegation that the sums paid to defendant were "unlawfully collected from the plaintiff", which allegation is denied. The defendant, however, alleges that the payment of $5,550.10 was made May 2, 1960 in lieu of May 5, 1960 and the payment of $4,696.82 was made May 25, 1960 in lieu of May 26, 1960. Finally, the defendant admits the allegations contained in the final sentence in paragraph 5; but denies that the taxes were "erroneously paid and unlawfully collected."

6. Admits the allegations contained in paragraph 6.

7. Denies the allegations contained in paragraph 7.

WHEREFORE, defendant prays that plaintiff take nothing from it in this suit and that the same be dismissed with costs against the plaintiff.

LOUIS F. OBERDORFER
Assistant Attorney General

EUGENE EMERSON
Attorney
Tax Division
Department of Justice

PLAINTIFF contends that all of the autos imported by P were used autos, and that the manufacturers' excise tax on autos imposed by 26 USC 4061 does not apply to used autos.

P asks judgment against the D in the amount of $20,246.92, with interest as provided by law.

DEFENDANT U.S. denies that the tax was erroneously imposed. D contends that the tax imposed by Sec. 4061 (a) is applicable to the initial sale of an imported auto in the U.S., regardless of whether the auto is new or used.

D requests leave to assert the further defense that some or all of the autos imported by P were new and not used.

(Ø P objects to such amendment of D's answer on the grounds (1) the request is untimely and (2) it is not made in good faith, and (3) will necessitate further discovery.

D denies that P is entiled to any tax refund. z

STIPULATIONS:

Facts under "UNDISPUTED FACTS".

It is stipulated that the following may be admitted without formal proof of authenticity, subject to all other objections:

No documents presented at PT hearing of 11/1/61

(If amendment to answer is permitted, counsel will present for possible stipulation any documents relevant to said issue which may be in their possession.)

Counsel agree to exchange, at least a week before the trial date, the names and addresses of all witnesses known to them, including experts, if any, (filing a copy with the Clerk of the Court) and if they learn of any additional witnesses prior to trial will exchange the names and addresses promptly.

Trial attorneys: For Plaintiff: Joseph J. Lyman
For Defendant: Eugene Emerson

Asst. Pretrial Examiner

* * * * * * *

Washington, D. C.

Thursday, December 6, 1962.

Deposition of GERALD G. SCHULSINGER, witness in the above-entitled cause, called for examination by counsel for the defendant, pursuant to oral stipulation as to time and place, formal notice being waived, at Room 3429, U. S. Court House, Washington 1, D. C., beginning at 2:30 p. m., before Harry Kaitz, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

JOSEPH J. LYMAN, Esq., for the plaintiff.

HERBERT S. KENDRICK, Esq., Department of Justice, for the defendant.

Thereupon

GERALD G. SCHULSINGER

was called for examination by counsel for the defendant and, after having been sworn by the notary, was examined and testified as follows:

MR. KENDRICK: Let the record show that this deposition is being taken pursuant to the agreement of counsel, and counsel for both parties further agree that this deposition will be admissible as evidence without objection in the defendant's case.

DIRECT EXAMINATION

BY MR. KENDRICK:

Q State your name and address, please, sir. A My name is Gerald G. Schulsinger. My address is 25 O Street, Northwest, Washington, D. C.

Q What is your occupation? A I am an attorney.

Q You practice here in Washington, D. C.? A I practice in the District.

Q You are a member of the District of Columbia Bar? A Yes, sir.

Q Are you a member of any other bars beside the District of Columbia? A The Bar of the Supreme Court of the United

States and the Bar of the Courts of Appeals of the Fourth and Tenth Circuits.

Q Mr. Schulsinger, are you the owner of a Volkswagen automobile? A Yes, sir.

Q What model is that car? A Do you mean the year, sir?

Q Yes, sir. A 1960.

Q When did you purchase this car? A I ordered it in October of 1959, and I took delivery of it in December of 1959.

Q From whom did you purchase this car? A It was from an establishment on Wisconsin Avenue, across the street from Sears Roebuck. The name, as I recall, was Peake Motors, P-e-a-k-e, or something like that. However, I was asked to write out the check to Circle Discount Corporation.

Q Mr. Schulsinger, were you looking for a new or used car? A I was looking for a new car.

MR. LYMAN: Objection. That is leading, and it is immaterial. immaterial.

MR. KENDRICK: Your objection is noted.

THE WITNESS: I was looking for a new car.

BY MR. KENDRICK:

Q What year model were you looking for? A I was looking for a 1960 model, and I had canvassed the various franchise dealers in the area, one in Virginia, one in the District of Columbia, and one in Maryland. Each of them advised me that--

MR. LYMAN: Objection. Hearsay.

BY MR. KENDRICK:

Q He is objecting to the question. Go ahead and answer it. A I was told there would be a waiting period at each of these dealers of a period of several months.

Q Mr. Schulsinger, did you get a new car title with your car? A No, sir.

Q Can you explain the circumstances surrounding the title of your car? A The order form showed on it that it was used. I inquired why the order form showed used, and it was my understanding that--

MR. LYMAN: Objection to your understanding.

BY MR. KENDRICK:

Q Continue. A It was my understanding that I was to get a new car. It was explained to me that--

MR. LYMAN: Objection, unless he can say that this explanation came from some member of the Circle Discount Corporation.

BY MR. KENDRICK:

Q Did the explanation come from some member of the

Circle Discount Corporation? A The explanation came to me from a Mr. Lawrence Peake. I don't know his connection with the Circle Discount Corporation.

MR. LYMAN: I object to anything he is going to testify to unless it can be shown that Mr. Peake was an agent or a member of Circle Discount Corporation.

BY MR. KENDRICK:

Q Continue on. A It was explained to me by Mr. Peake that he was not a franchise dealer and thus unable to get new cars directly from the Volkswagen factory in Germany, but that the Volkswagen Company in Germany was obligated to sell a certain proportion of its output on the local market, i.e., the German market; and that Mr. Peake had people in Germany who brought up cars from German dealers, sent them to Hamburg where they made various innovations to meet American specifications, such as changing the headlights and I believe also the safety glass, and then sending them to this country.

Q Then you did get a used title to the car? A I did.

Q All right. What representations by the salesman, what representations to you did the salesman make regarding the purchase of the Volkswagen? A There were several. First of all, there were--

MR. LYMAN: Objection, unless he says who the salesman was, if he knows. I think you ought to establish that first.

THE WITNESS: The salesman was Mr. Lawrence Peake, P-e-a-k-e.

MR. LYMAN: Objection. It is hearsay, unless it can be shown that Mr. Peake was an agent or a member of Circle Discount Corporation.

THE WITNESS: The representations Mr. Peake made to me were these. First, there were several automobiles in the showroom on Wisconsin Avenue. My recollection is that there were three, one a closed model, one the sliding roof top model, and one a convertible model. All of them looked brand new to me. It was represented to me thatthe car I would be getting would be identical to the corresponding model. Second, it was represented to me that the car I would be getting would be exactly the same kind of car that I would get from a franchise dealer. Third, it was represented to me that I would be getting a warranty on the automobile identical to what a franchise dealer would provide me and that this would include free examinations and checkup and servicing of the automobile at the 300 mile mark, the 1,500 mile mark, and I forget what the third one is, 2,500 or 3,000. Also, that it would be a 1960 Volkswagen.

BY MR. KENDRICK:

Q Do you have the bill of sale for that automobile with you? A I do, Mr. Kendrick.

MR. KENDRICK: Mark this Defendant's Exhibit 1 for Identification.

MR. LYMAN: No objection.

(Bill of sale was marked Defendant's Exhibit No. 1 for Identification and retained by Mr. Kendrick.)

BY MR. KENDRICK:

Q I hand you a document here entitled "Car order and bill of sale and ask you to identify it please, sir. A This is the document I received at the time I ordered the car and placed a deposit upon it.

Q Do you have your checks that you made out for payment of the car? A I do, sir.

Q Do you have them with you? A I do, sir.

MR. KENDRICK: Mark these checks 2 and 3 for Identification.

(Check #568 in the amount of $100 was marked Defendant's Exhibit No. 2 for Identification; check #570 in the amount of $1086.40 was marked Defendant's Exhibit No. 3 for Identification. (Both documents were retained by Mr. Kendrick.)

BY MR. KINDRICK:

Q All right, sir, I ask you to identify those documents, Defendant's Exhibit No. 2 and 3. A Defendant's Exhibit No. 2 is the check which I wrote out at the time I placed the order for the automobile by way of deposit on the order in the amount of $100. Defendant's Exhibit No. 3 is the check I wrote out at the time I took delivery of the automobile representing the balance due over and above the original deposit and the trade-in which I made at that time.

Q How long did you have to wait for delivery of your car? A From October 24, 1959, to December 3, 1959.

MR. KENDRICK: Your witness.

CROSS EXAMINATION

BY MR. LYMAN:

Q Do you know anything about the manufacture and production of Volkswagens in Germany other than what was told you by the person that you claimed told you? A I have read the manual which was given to me at the time I purchased the car.

Q And other than what was told to you by the person that sold you the car and the manual, did you know anything else about the production and manufacture of Volkswagens in Germany? A I have read the advertisements and I have discussed the Volkswagens with people from time to time.

Q Why didn't you go to a franchise dealer and purchase your car? A I did, sir. I telephoned three franchise dealers, Heishman's in Virginia, an outfit the name of which escapes me on Rhode Island Avenue in the District of Columbia, and one in Maryland. Each of them told me they had a waiting list for 1960 Volkswagens of approximately six to nine months. I went to Heishman, nevertheless, and put down a deposit and got on the waiting list. However, the car I then had was on its last legs, and I was anxious to get a new automobile as quickly as possible. I was advised I could get one from Mr. Peake.

Q When you say a new automobile, you mean another automobile? A No, sir, I mean a new automobile.

Q Did Mr. Peake tell you this was a new automobile? A Yes, sir.

Q Doesn't it say plainly on Exhibit 1, "Please enter my order for one used car as follows"? A It does, sir.

Q Did you read the conditions on the back? A I did, sir.

Q Did you read No. 4, "No warranty or representation is made by seller as to the extent the car purchased has been used regardless of the mileage shown on the speedometer of the said car"? A I have no particular recollection of reading that condition, but I believe that I read all of the conditions at the time.

Q Would you read it now, No. 4? A Yes, sir. "Four. No warranty"--

Q I mean, just read it to yourself. A Yes.

Q Do you recollect item No. 4 under conditions being on Exhibit No. 1 when you purchased the car? A I am sure all of those conditions were there at the time, sir.

Q Were you aware of it? A Yes, sir.

Q Where was the car titled? A In the District of Columbia.

Q In the District of Columbia? A Yes.

Q And did you look at your title? A I did.

Q And it says right on the title used car, does it not? A It does.

Q Have you ever owned a new car? A Yes, sir.

Q And how did the warranty on your new car that you purchased differ from the warranty that you received here, which is on Exhibit 1? A My recollection is that the warranty on a new car also called for three inspections at various mileage points. I don't recall whether they were the same as on this one or different.

Q Isn't it a fact that when you have a warranty on a new car that it warrants specific things, such as your battery and moving parts and generators and transmission and the like? A I have no idea whether the warranty spells out particular parts. I read that warranty and it seemed very satisfactory to me for a new car.

Q And you also know that a warranty on a new car can be honored at any particular dealer of that car, isn't that true? A I know that, sir, and I specifically asked Mr. Peake why this was different.

Q And did you notice that here it states that the work must be done in our shop? A I did notice that, and as I said, I inquired about it.

Q And you were satisfied with that? A I was satisfied with it.

Q And you were satisfied to take a, sign a contract where you entered an order for a used car? A I was satisfied on the basis of all their representations made to me.

Q And you were satisfied that the company made no warranty or representation as to the extent the car had been driven regardless of the speedometer? A I was satisfied that the condition appeared on the reverse side of the form.

Q And you were satisfied to take the title in the District of Columbia that said used car? A I was, indeed.

Q And yet you say you bought a new car? A I certainly did.

Q Did you inspect the car, generally? A Yes, sir.

Q And isn't it a fact that the speedometer had been replaced? A I have no way of knowing that, but I was told that there would be a different speedometer, because an American mileage speedometer would be substituted for a German kilometer speedometer.

Q So you don't know how many kilometers it had been driven, do you? A I know that it seemed to me in every respect a new car, sir. It even had the new car smell.

MR. LYMAN: I move to strike that as being unsolicited. I don't believe he answered that original question. Will you give me my last question?

(The Notary-Reporter read the last question.)

THE WITNESS: No.

BY MR. LYMAN:

Q When was the first time you were approached by an agent of Internal Revenue? A Approximately one week ago yesterday. I believe it was a week ago yesterday.

Q Was that an agent of the Internal Revenue or a member of the Department of Justice? A I think he told me he was an agent of the Internal Revenue Service.

Q What did he tell you concerning the nature of his inquiry? A He first asked me certain questions which I answered. He then told me that there was a lawsuit brought by Circle Discount against the United States for refund of certain taxes. He then told me that I might hear from one of the lawyers conducting the case.

Q Was anything said about any of the officers of the corporation? A No, sir.

Q Was anything said about anyone misrepresenting the nature of the Volkswagens being sold by Circle Discount? A No sir.

Q Pardon. A No, sir. I may have volunteered that I received exactly what was represented to me and I was fully satisfied with the car in every respect.

Q Have you ever told anyone other than this agent that you bought a new car? A I am sure I told many people--

MR. KENDRICK: I object to that question. What he told somebody else wouldn't make any difference in this lawsuit.

BY MR. LYMAN:

Q And why did you tell them that you bought a new car when in fact you knew you bought a used car? A I told them that I bought a new car which had a used car title.

Q It was all guesswork on your part then, wasn't it? It was just your opinion, wasn't it?

MR. KENDIRCK: Objection.

BY MR. LYMAN:

Q Wasn't it just your opinion that you bought a new car with a used car title? A I don't understand the question, Mr. Lyman.

Q You told someone that you bought a new car with a used car title? A Yes, sir.

Q Is that right? A Yes, sir.

Q Well, now, what was the basis upon which you concluded that it was a new car?

MR. KENDRICK: Objection. It calls for a conclusion. He stated his reasons.

MR. LYMAN: This is cross-examination.

THE WITNESS: The basis was, first, that it was represented to me as a new car; second, when I took delivery of it, it seemed to me in every respect a new car; and, third, I wouldn't have accepted it if it weren't a new car.

BY MR. LYMAN:

Q You said that it was represented to you as a new car? A Yes, sir.

Q Now, this was Mr. Peake? A Yes, sir.

Q And what were the words he used? A I don't recall his exact words.

Q I am going to ask you to try to remember. What did he say? A He said that it would be exactly the same as the cars which were on display in the showroom and that after the changes were made in Hamburg it would be exactly the same as the car I would receive from a franchise dealer.

Q Now, the cars in the showroom were not the cars of a franchise dealer, were they? A I have no idea who owned them, sir.

Q Well, he had told you he was not a francise dealer, did he not? A He did.

Q And he told you you would get the same car as those in the showroom, is that correct? A Yes, sir.

Q Now, was any representation made toyou that the cars in the showroom were new cars? A I don't recall, sir. They seemed to me in every respect to be new.

Q You mean, they were shiny and smelled good?
A Smelled new.

Q Did the cars in the showroom have the familiar sticker which deals with the truth in labeling law? A I have no

recollection if it had a sticker, sir, or even if that law was in effect in October of 1959.

Q Assuming that it was in effect in 1959, do you recall seeing such a sticker on any of the windows of those three cars in the showroom? A I have no recollection of any sticker on the cars.

Q Was there a sticker on any window of your car at the time of delivery having to do with the truth in labeling law? A No, sir.

Q Did you ask about it? A About the absence of the sticker?

Q Yes, sir. A No, sir.

Q Isn't it a fact that the reason the sticker was not on there is because it was a used car? A I have no idea why there was no sticker or whether there was any legal requirement to have a sticker, whether new or used.

Q Did you have anyone else other than Circle Discount inspect this car at any time? A No, sir.

Q Did you have occasion to get under the car for any reason? A At the time of the purchase Mr. Peake who delivered it to me opened both the rear where the engine is and the front where the trunk is. I don't recall either he or I climed underneath it. I am sure I didn't.

Q And you found the car shined up on the body, is that correct? A It was shiny, yes, sir.

Q Did you have leather upholstery? A I don't know if the upholstery is a kind of plastic or leather, sir.

Q It wasn't mohair type of covering, was it? A You are out of my element. I think it was vinyl.

Q Isn't it a fact that that had been put in there prior shipment to you? A I have no idea when it was put in there, sir.

Q And did you look under the fenders at the time? A Under the fenders, sir?

Q Yes, sir. A No.

Q To see whether there was road dirt? A I didn't look, sir.

Q I suppose you know if you did look you would have found it? A I know nothing of the sort. I doubt it.

Q But because the motor was cleaned up and the windows were shiny and the body was shining you assumed it was a new car? A It seemed to be a new car in every respect, sir. There wasn t a scratch on it.

Q Now, getting back to Mr. Peake, tell me exactly again what he said how his car he would sell you would compare with the franchise dealers car. A It would be exactly the same as the car I would receive from a franchise dealer. Originally, it would not be exactly the same, because the Volkswagen people made two cars, one a so-called export model and one for the German economy. These cars, as I pointed out, were intended for the German economy; and, according to

Mr. Peake, therefore needed certain adaptations to make them acceptable under American standards, including headlights, safety glass, and perhaps other features, turn signals.

Q But when he delivered it, it wasn't the same as you get from a franchise dealer, isn't that a fact? A I don't understand, sir. These various steps I talked about, the replacement of the beams, the installation of the new turn signals, and so forth, had all been performed.

Q That could be done on a used car, too, you know that. A Are you asking me if theoretically the adaptations could be made to a used car?

Q Yes. A The answer is yes.

Q But the car you received was not the same in all respects as that received from a franchise dealer, isn't that true? A It differed in these respects, sir. No. 1, the price was higher than I would have paid at a franchise dealer.

Q So that is one difference? A That is right. No. 2, the title specified a used car. No. 3, the work had to be done at Mr. Peake's garage. And, No. 4, these various adaptations had been performed. To my knowledge, there were no other differences.

Q Had you bought it from a franchise dealer you would have gotten a new car guarantee, would you not? A To my knowledge, this was a new car guarantee.

Q You would have received a new car title? A Correct.

Q And your bill of sale would have stated it was a new car? A It would.

Q And you would have paid a lesser price? A I would.

Q So it wasn't the same car as you get from a franchise dealer? A It differed in the respects I have enumerated.

Q You mentioned the turn signals? A Yes, sir.

Q They are the type of turn signals that you are familiar with in the American car? A Correct, sir.

Q Are you familiar with the turn signals sometime that you see in a foreign car like a flipper? A I am, sir. I was in Germany last year and rented a Volkswagen.

Q And the Bolkswagen over there had a flipper? A Yes.

Q Did you notice whether the flipper had been leaded in and welded to your frame here or not? A The provision for the flipper is there. You could see where the flipper would ordinarily be. What arrests it, what prevents it from movement, I have no idea.

Q But you can see that there is an impression, perhaps? A Oh, yes.

Q And this impression is painted over or welded over some how? A The break in the metal line is clearly recognizable. There may be a 1/16 of an inch or a 1/32 of an inch aperture there.

Q And from your knowledge of the Volkswagen that you saw in Germany, that would be where the flipper would ordinarily come out? A Yes, sir.

MR. LYMAN: That is all.

REDIRECT EXAMINATION

BY MR. KENDRICK:

Q Mr. Schulsinger, would you explain again why the word used appears on the title?

MR. LYMAN: Objection. This is only conjecture on his part.

BY MR. KENDRICK:

Q Would you tell us the explanation you received from the salesman as to why you were not going to receive a new car title? A Yes, sir. Mr. Peake explained to me that he was not a franchise dealer and thus not authorized by the Volkswagen Company to sell new cars, but the way he received his cars was by having somebody in Germany buy up automobiles from German dealers, send them to Hamburg for certain adaptations, and then to this country.

Q Now, in so far as your warranty is concerned, did the salesman assure you that this warranty was the same as a warranty on a new Volkswagen?

MR. LYMAN: Objection. The warranty speaks for itself.

BY MR. KENDRICK:

Q Go ahead. A I so understood, and it was so represented to me specifically.

Q You specifically asked about the warranty?

* * * * * * *

Q On that Wisconsin Avenue address that you went to, isn't it a fact that a big sign on the window said used Volkswagens? A I don't recall any such sign, and I would be mighty surprised if there were one in October of 1959 or in December of 1959.

Q You say you would be mighty surprised if you knew there was one. Why would you be surprised? A Because I wouldn't have gone in.

Q What do you have against Circle Discount, sir? A Nothing, sir.

Q What do you have against Mr. Peake? A Nothing. I should add I only heard of Circle Discount in so far as the name appeared on the bill of sale and in so far as I was directed to write the check out to them. Other than that, I have never heard of Circle Discount until I heard about this case.

Q What is the name of the place that you did go into? A As I testified earlier, it was Peake Motors or some adaptation of that, the word Peake there, Peake Automobiles, Peake Motors, Peake something.

Q Did you see Foreign Imports across the top of the door? A I don't recall, but it may have been, sir.

Q Pardon. A It may have been. I have no specific recollection of that.

Q Would you be surprised if it were on there? A Not at all.

Q Would you be surprised if the word used Volkswagens were on there? A I would be surprised if it were in any spot conspicuous enough for me to see it in October of 1959 or in December of 1959.

Q Now, I just want to clear that one point up. You are saying that the legend, used Volkswagens, was not displayed? A I don't recall, sir.

Q Well, if you wouldn't have walked in there because the phrase used Volkswagens would have been displayed, why would you purchase one when on your bill of sale the words used car are clearly displayed? A Because I was given to understand that I would be getting a new Volkswagen except for the several factors listed, the title, the various adaptations, the price.

Q Tell me something, why would you enter into such a transaction when you in your own mind knew something was wrong with it? A I certainly didn't know then or now that there was anything wrong with it.

Q Let me understand you, sir. You said you went to buy a new car and they gave you a used car title and you say there is nothing wrong with it. A I have no reason to believe

there is anything wrong with that, no, sir, so long as I know what I am getting and it is properly represented to me, which it was.

Q And you are saying that if the words used Volkswagens were on the front of the premises you would have not walked in, but yet when your contract states in terms that there is no guarantee as to how far this car has been driven you still insist that you were getting a new car? A Yes, sir.

Q Now, sir, why would you enter into an arrangement like that when you knew it wasn't exactly as it was represented to you? A It was exactly as represented to me.

Q Let me ask you, why did you pay more money for this car which was represented to you as used than you would for a new car? A Because I was promised delivery within forty-five days after the order was placed on 24 October, 1959, and to receive a new car from a franchise dealer would have required me to wait for a longer time.

Q So you were willing to pay more money for a car labeled publicly as used than wait for a few months for a car that you knew would have a warranty as a new car, isn't that true? A I was willing to pay more money for a car which seemed to me new but which the bill of sale said used than wait six or nine months to get a new car from a franchise dealer, yes, sir.

Q And you feel you are justified in representing on behalf of the defendant that the car you bought is a new car with all these circumstances? A I can't speak for the defendant, sir. I can only speak for myself. I received a new car with a used car title.

Q This is really your opinion, then, isn't it? A I don't understand your question.

Q I said what you are expressing is really an opinion, isn't that true? A I don't understand--

MR. KENDRICK: I will object to that. What he is expressing speaks for itself.

BY MR. LYMAN:

Q I am going to ask you, aren't you expressing an opinion that it was a new car? A So far as I am concerned, it was a fact, period.

Q What was a fact? A It was a fact that I was receiving a new car with a used car title.

Q Did that window on those premises on Wisconsin Avenue where you purchased your car say new Volkswagens? A I have no recollection that it did.

Q I believe your testimony just now was that you had to wait from six to nine months, did you say, for delivery? A At franchise dealers. My testimony was that I was told that I would have to wait six to nine months.

Q Do you still have the Volkswagen? A Yes, sir.

Q And do you intend to sell it at any time? A Not in the near future. I am very pleased with it.

Q And when you do sell it, do you intend to represent that you are the first owner?

MR. KENDRICK: I object to that. That is a matter of speculation.

BY MR. LYMAN:

Q I want to know if you intend to represent it that way. A Intend to represent exactly what happened.

MR. LYMAN: I have no further questions.

MR. KENDRICK: I have one other question.

FURTHER REDIRECT EXAMINATION

BY MR. KENDRICK:

Q Mr. Schulsinger, do you bear any ill will toward Circle Discount or Mr. Peake or whoever it was that sold you the car? A No, sir. I know nothing about Circle Discount, and I was very pleased with the transaction with Mr. Peake.

Q As far as you are concerned, it was a happy ending to the purchase of a Volkswagen? A Yes, sir.

MR. KENDRICK: That is all.

MR. LYMAN: That is all.

(Thereupon, the taking of the deposition was concluded.)

(By stipulation of counsel, with the consent of the witness, reading and signature waived.)

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P R O C E E D I N G S

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Filed Dec. 19, 1962

OPINION OF THE COURT

THE COURT: This case involves the construction and application of the Internal Revenue tax imposed on manufacturers and importers of automobiles, especially as it affects importers. This action is brought by an importer of automobiles to secure a refund of the tax that had been levied and assessed against him by the Internal Revenue Service on automobiles that he imported between October 1st, 1959 and June 30th, 1960. The amount of the tax involved is $20,246.92. This tax was paid to the Government after demand, a claim for refund was filed, and subsequently this suit was brought to recover the amount of the tax.

The plaintiff contends that the automobiles that he imported were used or second hand vehicles and that the tax in question is not applicable to used cars. The Government puts in issue the question of fact whether these vehicles were in fact new or used automobiles, but further contends that as a matter of law this issue of fact is immaterial and that the tax is applicable both to new and used cars.

Taking up first the question of fact, the principal witness in behalf of the plaintiff was Bruno Figlinzzi, who was the majority stockholder of the plaintiff corporation and managed and conducted its business. He testified that he

was in the business of importing and selling used foreign cars during the years involved in this case. In some detail he related that he made trips to Germany and that he purchased German automobiles, known as Volkswagens, from used car dealers and from private owners in Europe and that he did not purchase any from either the manufacturer or from a franchised dealer in new cars. He further testified that after he purchased those cars some changes were made in them in shops in Europe, in order that they would comply with the requirements of the laws and regulations of the various States of the Union. Subsequently to that they were brought to this country and sold either at wholesale to used car dealers or to individual purchasers.

There were introduced in evidence two samples of bills of sale used by the plaintiff in connection with selling the vehicles that it had imported. Each of those bills of sale referred to the automobile involved therein as a used car. The testimony is to the effect that this form was used by the plaintiff in all of its sales involved in this case. The Government offered no evidence to contradict this testimony.

The original invoices of the various importations, according to the testimony, are on file in the United States Customs Bureau, and so were easily available to the Government.

The title documents are on file in the various recording offices in the District of Columbia, Maryland or Virginia, where the sales of the automobiles were made.

It might be observed also that originally the defendant's answer did not deny, and by failure to deny admitted, the allegation that these automobiles were second hand vehicles. It was only at pretrial that the Government procured leave to amend the answer so as to assert that the automobiles were new; and, yet, no proof was introduced in behalf of the defendant on that issue.

The Court finds as a fact that the automobiles involved in this case were used vehicles.

This brings us to the question of law involved in this case, namely, whether the tax in question is applicable to used cars. The pertinent provisions of the statute imposing the tax are found in 26 United States Code 4061(a). The statute provides, in part, as follows:

> "There is hereby imposed upon the following articles . . . . sold by the manufacturer, producer or importer, a tax equivalent to the specified percent of the price for which so sold."

This sub-section provides that automobiles and trucks would be taxable at ten per cent.

This tax has been construed as an excise tax on the initial sale of the vehicle either by the manufacturer or an importer. No tax is imposed on any subsequent sales. It is important to observe that no exception is made for used or second hand cars. On its face, this statute is applicable to all cars sold by the manufacturer, producer or importer.

The Supreme Court, in referring to this tax, construed it as follows, in Indian Motorcycle Co. v. United States, 283 U.S. 570, 574:

> "We think it" -- that is, the tax -- "is laid on the sale, and on that alone. It is levied as of the time of the sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on first or initial sales -- those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed."

This case did not involve the point presented here and to a certain extent the foregoing statement may be considered a dictum; it is, however, helpful in determining the construction of the statute.

The Internal Revenue Service has administratively construed the statute as applicable to used automobiles of foreign manufacture. Internal Revenue Bulletin 58-297 deals with this subject and reads as follows:

"Used automobiles of foreign manufacture are imported and sold in this country. The importer's sales of the used automobiles constitute the initial sales of the automobiles within the United States. Held, the manufacturers excise tax on automobiles sold by the manufacturer, producer, or importer thereof, imposed by Section 4061 of the Internal Revenue Code of 1954, applies to the importer's sales of the automobiles. It is immaterial that the vehicles had been used prior to their importation."

To be sure, as counsel for the plaintiff contends, this statement is not a regulation and does not have the force of law. On the other hand, it indicates and is evidence of the administrative construction of the statute.

It is, of course, well established that an administrative construction of a statute by the agency charged with the duty of enforcing or applying it is entitled to great weight. Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315; United States v. American Trucking Assoc., 310 U.S. 534, 549; National Labor Relations Board v. Denver Building and Construction Trades Council, 341 U.S. 675, 692; Federal Trade Commission v. Mandel Brothers Inc., 359 U.S. 385, 391; West Texas Utilities Co. v. National Labor Relations Board, 97 App. D.C. 179, 181.

Necessarily, if the administrative construction is patently erroneous or unreasonable, it will be discarded by the Courts. This is not such a case, however. The statute is unambiguous. There is nothing in the legislative history that would unequivocally lead the Court to construe it otherwise than according to its literal meaning. Therefore, the Court reaches the conclusion that the statute is as applicable to the importations of used cars as it is to importations of new cars, the tax being levied on the initial sale.

It is urged, however, by counsel for the plaintiff that any ambiguity in a tax statute must be resolved in favor of the taxpayer. The Court agrees that this is a correct principle of law. The difficulty with applying it in the instant case is that there is no ambiguity on the face of the statute.

It is also urged that this interpretation of the statute would result in a discrimination as against imported used cars by comparison with sales of domestic used cars. The Court disagrees. The purpose of the statute is quite evidently to tax the initial sale of any automobile sold in this country, whether it is sold by a manufacturer of a vehicle fabricated in the United States or by an importer who brings it into this country. Under those circumstances, it cannot be reasonably argued that there is any discrimination as against used cars. Actually, if this tax was held inapplicable to

imported used automobiles, there would be a discrimination operating in the opposite direction. In any event, the question of discrimination, if it exists, is a matter for legislative consideration, and if there is any injustice in the tax the remedy lies alone with Congress.

Accordingly, the Court, as above stated, concludes that the tax is applicable to the initial sales in this country of imported used cars to the same extent that it applies to the initial sales of imported new cars.

A transcript of this oral decision will constitute the findings of fact and conclusions of law.

Judgment for the defendant dismissing the complaint on the merits.

* * * * * * *

CIRCLE DISCOUNT CORPORATION, Plaintiff

v.

UNITED STATES OF AMERICA, Defendant

CIVIL ACTION NO. 1490-61

Filed Dec. 20, 1962

FINAL JUDGMENT

This cause came on for trial before the Court, without a jury, on the 7th day of December, 1962, the parties having appeared by their respective counsel and the issues having been duly tried, and the Court having rendered its Opinion

on the 10th day of December, 1962 which is hereby adopted as Findings of Fact and Conclusions of Law, directing judgment as hereinafter provided, it is

ORDERED AND ADJUDGED that Final Judgment be, and the same hereby is, entered for the defendant, United States of America, and defendant is hereby awarded costs.

Dated at Washington, D. C., this 20th day of December, 1962.

/s/ Alexander Holtzoff

UNITED STATES DISTRICT JUDGE

* * * * * * *

FILED
January 9, 1963

CIRCLE DISCOUNT CORPORATION, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

Civil No. 1490-61

NOTICE OF APPEAL

Notice is hereby given this 9th day of January, 1963, that Circle Discount Corporation hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of December, 1962 in favor of the United States of America against said

Circle Discount Corp., a corporation.

s/ Joseph J. Lyman

Attorney for Plaintiff

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Defendant's Exhibit 4

October 17, 1959

Mr. Henry George
1358 Belvoir Blvd.
Cleveland 21, Ohio

Dear Mr. George:

Reference is made to your telephone call of October 16, 1959. Our price structure as you may realize is based on direct shipment. For a substantial order we may arrange a trip to Europe so that you may be acquainted with our mode of operation.

The price in our advertisement includes cost, insurance and freight to the port of your choice. Customs and duty charges will be paid by your company. The cost of customs and duty on 1960 sedans and/or sunroofs averages ninety-five dollars per unit.

In each shipment there will be an ample assortment of colors. All cars are deluxe models and come equipped with syncromesh transmissions, leatherette interiors, sealed beam headlights with out lamps, mileage speedometers, turn signals,

ASl windshields, outside mirrors, heaters and defrosters. (Deduct $15.00 if cloth interiors are desired). They may be ordered with the following extras:

BUMPER RAILS, FRONT AND REAR $25.00

Becker Radios (Installed) 45.00

We can have cars delivered to you within 45 days from the date we receive your order, barring unforseen circumstances such as strikes.

Our 1960 Volkswagens must all be sold as used. We are not directly affiliated with any factory, consequently we cannot sell any of our cars as new. All of our cars are like new but will have from 1 to 100 miles on the speedometer.

All orders must be accompanied with an irrevocable letter of commitment from your bank. Payments may also be effected by a twenty percent deposit with the order and a letter of commitment by your company that the merchandise will be paid for within five days after its arrival at the port of your choice.

We are enclosing for your convenience a sample letter of commitment. Any questions will be gladly answered by Mr. Hugh Darling, Assistant Vice President of the Riggs National Bank.

We are looking forward to serving you.

Very truly yours,

Bruno Figlinzzi
President

Our trade references are:

Mr. Carl Dunnington, Vice President
Security Bank
Washington, D. C.

Mr. Edward Lacomis, Vice President
Reliable Finance Company
7845 Eastern Avenue
Silver Spring, Maryland